GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

STATE OF MICHIGAN

IN THE SUPREME COURT

JEFFREY HAKSLUOTO
and **CAROL HAKSLUOTO,**

Plaintiffs-Appellants,

-vs-

MT. CLEMENS REGIONAL MEDICAL CENTER, n/k/a MCLAREN MACOMB, GENERAL RADIOLOGY ASSOCIATES, P.C., and **ELI SHAPIRO, D.O.,**

Defendants-Appellees.

MI Supreme Court No.: 153723
MCOA Docket No.: 323987
Macomb Cir. Ct. No.: 14-2556-NH

DEFENDANTS-APPELLEES' RESPONSE TO PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

LeROY H. WULFMEIER, III (P22583)
JARED M. TRUST (P72993)
GIARMARCO, MULLINS & HORTON, P.C.
Attorneys for Defendants-Appellees
101 W. Big Beaver Rd.
10th Floor Columbia Center
Troy, MI 48084-5280
(248) 457-7000

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

TABLE OF CONTENTS

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

I. LIST OF CITED EXHIBITS

No.	Description
1	Opinion and Order of Macomb County Circuit Court, dated September 16, 2014
2	Transcript of Summary Disposition Motion, dated August 11, 2014
3	Defendants' Motion for Summary Disposition
4	Plaintiff's Response to Defendants' Motion for Summary Disposition
5	Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Summary Disposition
6	Defendants-Appellees' Supplemental Brief Addressing Case Law That Plaintiffs-Appellants' Counsel First Cited at August 11, 2014 Oral Argument
7	Plaintiffs-Appellants' Supplemental Response to Defendants-Appellees' Court Ordered Brief
8	*Dewan v Khoury,* Unpublished Opinion Per Curiam of the Court of Appeals, issued March 28, 2006 (Docket No. 265020)
9	*Lancaster v Wease,* Unpublished Opinion Per Curiam of the Court of Appeals, issued September 28, 2010 (Docket No. 291931)
10	*Hardin v Prieskorn,* Unpublished Opinion Per Curiam of the Court of Appeals, issued April 1, 2014 (Docket No. 311193)

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

II. INDEX OF AUTHORITIES

Cases

Statutes

Court Rules

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

III. STATEMENT OF JURISDICTION

Defendants-Appellees do not contest that Plaintiff-Appellants' Application for Leave was timely and thus, procedurally, jurisdiction is appropriate. However, as set forth in *Great Lakes Realty Corp v Peters,* 336 Mich 325, 328-329 (1953), the criteria for granting leave to appeal to the Michigan Supreme Court includes whether a case presents an "issue[of] significant public interest" or "involves legal principles of major significance to the state's jurisprudence"). Even assuming that Plaintiffs-Appellants Notice of Intent (NOI) was timely to toll the applicable statute of limitations, which it was not, and the document provided 182 days of tolling of the statute of limitations, Plaintiffs-Appellants' claim is/was *still* untimely. Thus, Defendants-Appellants dispute that such arguments and issues set forth within Plaintiffs-Appellants' Brief on Appeal, although undeniably pertinent to the Haksluotos, give rise to the level of issues of public interest or issues involving legal principles of major significance warranting a substantive review.

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

IV. STATEMENT OF QUESTIONS PRESENTED

1. WHETHER PLAINTIFFS-APPELLANTS' NOTICE OF INTENT SERVED ON THE LAST DAY OF THE STATUTE OF LIMITATIONS PERIOD PROVIDES A TOLLING OF THE TWO-YEAR MEDICAL MALPRACTICE STATUTE OF LIMITATIONS?

Defendants-Appellees say:	"Yes"
Plaintiffs-Appellants says:	"No"
Trial Court says:	"No"
Appellate Court says:	"Yes"
Supreme Court should say:	"Yes"

2. WHETHER EVEN ASSUMING PLAINTIFFS-APPELLANTS' NOTICE OF INTENT WAS TIMELY SERVED AND TOLLING OF THE CLAIM APPLIED, WAS THEIR MEDICAL MALPRACTICE CASE FILED 183 DAYS AFTER THE TWO-YEAR LIMITATIONS DATE UNTIMELY?

Defendants-Appellees say:	"Yes"
Plaintiffs-Appellants says:	"No"
Trial Court says:	"No"
Appellate Court says:	"Yes"
Supreme Court should say:	"Yes"

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

GMH GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

V. STATEMENT OF FACTS PERTINENT TO THE SUBSTANCE OF PLAINTIFFS-APPELLANTS' COMPLAINT

Plaintiffs-Appellants' Complaint alleges that on December 26, 2011, Plaintiff-Appellant Jeffrey Haksluoto presented to the emergency room at Defendant-Appellee Mount Clemens Regional Medical Center (hereafter MCRMC) n/k/a McLaren Macomb. (Appx. 1b-20b). During that visit he underwent a computerized tomography (CT study) that was interpreted by Defendant-Appellee Dr. Eli Shapiro, a radiologist.[1] (Defendants' Motion for Summary Disposition attached as **Exhibit 3,** Appx. 40b-91b, Plaintiffs' Complaint**, Exhibit 3, Tab B,** Appx. 1b-20b). Plaintiffs-Appellants allege that Dr. Shapiro misread the CT study on December 26, 2011, and claim that this resulted in damages to the Plaintiffs-Appellants. (Appx. 1b-20b) Jeffrey Haksluoto's wife, Carol Haksluoto, alleged that she sustained damages as well (loss of consortium). (Appx. 12b-13b)

VI. STATEMENT OF PROCEDURAL HISTORY RELEVANT TO THIS APPEAL

The dates pertinent to this appeal are not in dispute. Plaintiffs-Appellants' alleged claim accrued on December 26, 2011, which is the date on which the CT was allegedly misread by Defendant-Appellee Dr. Shapiro. (Appx. 1b-20b) The Plaintiffs-Appellants' claim for medical malpractice, absent any tolling, is subject to the two-year limitations period applicable to a medical malpractice action. MCL 600.5805(6). Jeffrey and Carol Haksluoto, through Counsel, served their untimely Notice of Intent (NOI) on Thursday, December 26, 2013. (Defendants' Motion for Summary Disposition, **Exhibit 3, Tab A**, Appx. 21b-39b). Accordingly, Plaintiffs-Appellants failed to provide timely notice to the

[1] At the time of the alleged malpractice, Defendant-Appellant Shapiro was associated with Defendant-Appellant General Radiology Associates, P.C.

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

Defendants-Appellees in accordance with MCL 600.5838a, MCL 600.5856, MCL 600.2912b, MCR 1.108.

Even assuming that Plaintiffs-Appellants' NOI was timely served on December 26, 2013, Plaintiffs-Appellants' Complaint is *still* untimely as it was filed one hundred and eighty-three (183) days after the NOI was served, on June 27, 2014. (**Exhibit 3, Tab B**, Appx. 40b-91b). Even setting aside the well-reasoned Michigan Court of Appeals analysis and holding that Plaintiffs-Appellants' NOI did not provide timely notice of the pending claim; because June 27, 2014, fell 183 days after December 26, 2013, Defendants-Appellees moved for summary disposition pursuant to MCR 2.116(C)(7). (**Exhibit 3,** Appx. 40b-91b); *see also* **Exhibit 4**: Plaintiffs' Response to Defendants' Motion for Summary Disposition, Appx. 92b-103b; **Exhibit 5**: Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Summary Disposition, Defendants' Motion for Summary Disposition, Appx.104b-119b). In response thereto, Plaintiffs-Appellants argued that tolling began the moment of mailing, preserving that additional day to file suit after the 182nd day expired. (**Exhibit 4**, Plaintiff's Response to Defendants' Motion for Summary Disposition, Appx. 92b-103b).

Oral argument was heard before the Macomb County Circuit Court on August 11, 2014, at which time Defendants-Appellees' dispositive motion was taken under advisement by the Honorable Peter Maceroni. (**Exhibit 2**, Macomb County Docket Information, Appx. 120b, Transcript of Oral Argument 160b-176b). At the request of the Court, Defendants-Appellees submitted a Supplemental Brief addressing case law that Plaintiffs-Appellants' Counsel first cited at the August 11, 2014, oral argument. (**Exhibit 6**, Appx. 123b-131b). Counsel for Plaintiffs-Appellants then contacted the Court, resulting

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

in the filing of a Supplemental Response to Defendants-Appellees' Court-ordered brief. (**Exhibit 7**, Appx. 132b-138b).

The Trial Court then entered an Opinion and Order denying Defendants-Appellees' Motion for Summary Disposition. (**Exhibit 1**, Appx. 139b-145b). In denying Defendants-Appellees' Motion for Summary Disposition, the Trial Court erroneously accepted Plaintiffs-Appellants' argument that a NOI served on the last day of the two-year statute of limitations for malpractice cases preserves an additional full day to file suit *after* the 182-day tolling period expires, which grants Plaintiffs-Appellants 183 days to file a medical malpractice claim. (*Id.*)

Defendants-Appellees filed an Application for Leave to the Michigan Court of Appeals on October 3, 2014, seeking review of the question of whether a tolled medical malpractice case filed 183 days after the two-year limitations date is timely. (Appx. 32a, Michigan Court of Appeals Docket Sheet, 146b) Plaintiffs-Appellants opposed the Application. (Appx. 94a). The Court of Appeals granted leave on December 3, 2014, limited to the issue of the timeliness of Plaintiffs-Appellants' case. (Appx. 150b) On February 18, 2016, the Court of Appeals reversed the Circuit Court and remanded for entry of an Order granting summary disposition in favor of Defendants-Appellees, holding that Plaintiffs' service of the NOI was not timely and thus did not toll the statutory period of limitations. (Appx. 157b). The Court of Appeals held that pursuant to MCR 1.108(1), the 182-day notice period did not begin until December 27, 2013, and, as a result, the NOI did not toll the statute of limitations as provided under MCL 600.5856(c). (Appx. 155b-157b). Thus, Plaintiffs-Appellants' Complaint was appropriately time-barred. *Haksluoto v Mt. Clemens Regional Medical Center,* 314 Mich App 424 (2016), Appx., 151b-157b.

GMH GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

On March 8, 2016, Plaintiffs-Appellants moved for reconsideration of the Court of Appeals Opinion. (Appx. 148b). On April 4, 2016, the Court of Appeals properly denied Plaintiffs-Appellants' Motion for Reconsideration. *Haksluoto v Mt. Clemens*, unpublished order of the Court of Appeals, entered April 4, 2016. (Appx. 148b, 158b).

Plaintiffs-Appellants submitted an Application for Leave to Appeal to this Honorable Court on February 18, 2016. (Appx. 149b). This Honorable Court granted such an Application for Leave to determine/analyze, among other issues, 1) whether a Notice of Intent under MCL 600.2612b that is mailed on what would otherwise be the last day of limitations period of MCL 600.5856(6) tolls the statute of limitations as provided by MCL 600.5856(c); and 2) if the limitations period was tolled in this case, whether the Plaintiffs were required to file on the 182nd day or the notice period of the day after the 182nd day in order for their Complaint to be timely. (Appx. 159b).

VII. DEFENDANTS-APPELLEES' SHORT ANSWER/RESPONSE

I. PLAINTIFFS-APPELLANTS' NOTICE OF INTENT DID NOT TOLL THE APPLICABLE STATUTE OF LIMITATIONS PERIOD.

Plaintiffs-Appellants did not serve a timely NOI to provide the Defendants in this matter notice of a pending claim pursuant to a plain reading of MCR 1.108(1), MCL 600.2912b and MCL 600.5856(c). As properly espoused by the Court of Appeals, Plaintiffs-Appellants' claim accrued on December 26, 2011. (Appx.155b). Plaintiffs-Appellants did not serve a timely NOI and did not effectuate any tolling of their possible medical malpractice claim as the NOI was served on December 26, 2013, or, the last day of the applicable statute of limitations. The Court of Appeals properly held that the NOI served by the Plaintiffs-Appellants began a notice period/tolling on December 27, 2013, or, after the two-year statute of limitations period expired pursuant to MCL 600.5805(6).

(Appx. 151b-157b). Thus, Plaintiffs-Appellants were not afforded a tolling period as set forth pursuant to MCL 600.2912b(1) and their claim is time-barred. (Appx. 157b).

II. EVEN IF PLAINTIFFS-APPELLANTS' NOTICE OF INTENT DID TOLL THE APPLICABLE STATUTE OF LIMITATIONS PERIOD, THEIR COMPLAINT IS UNTIMELY.

Even assuming that Plaintiffs-Appellants' NOI did act to provide a 182-day tolling period pursuant to MCL 600.5805(6), Plaintiffs-Appellants' claim is still time-barred. Plaintiffs-Appellants' claim accrued on December 26, 2011. Assuming Plaintiffs-Appellants' NOI dated December 26, 2013, provided Plaintiffs-Appellants a 182-day tolling period under MCL 600.2912b(1), such tolling period expired on June 26, 2014. Plaintiffs-Appellants filed their untimely Complaint on June 27, 2014. Consistent with a plain-reading of MCL 600.2912b and the interpretive case law, Plaintiffs-Appellants' claim is time-barred.

VIII. STANDARD OF REVIEW

This Court reviews *de novo* a Trial Court's denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court also reviews *de novo* the proper interpretation of court rules. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). Additionally, the within appeal involves issues of statutory interpretation, which are reviewed *de novo*. *Grossman v Brown,* 470 Mich 593, 598; 685 NW2d 198 (2004).

Pursuant to MCR 2.116(C)(7) , summary disposition is appropriate where the claim is barred by the applicable statute of limitations. *Maiden, supra*, at 119. MCR 2.116(C)(7) empowers the Court to grant dismissal where the statute of limitations has expired. In the absence of disputed facts, the question whether a Plaintiffs-Appellants' cause of

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

action is barred by the statute of limitations is a question of law to be determined by the Court. *Moll v Abbott Laboratories*, 441 Mich 1, 26; 506 NW2d 816 (1993).

A dispositive motion brought pursuant to MCR 2.116(C)(8) is based on the allegations set forth in the pleadings and operates to assess the legal sufficiency of the Complaint. *Feyz v Mercy Memorial Hospital*, 475 Mich 663, 672; 719 NW2d 1 (2006). "When a challenge to a Complaint is made, the Motion tests whether the Complaint states a claim as a matter of law, and the Motion should be granted if no factual development could possibly justify recovery." *Id.* A mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *Koebe v LaBuda,* 339 Mich 569, 573; 64 N.W. 2d 914 (1954).

IX. ARGUMENT

In this case, Plaintiffs-Appellants not only served an untimely NOI, but, even if the NOI is found to be timely and afforded a 182-day tolling of the statute of limitations, Plaintiffs-Appellants' claim is still time-barred as they filed an untimely suit two years and 183-days after the date that their claim accrued. The rationale behind their untimely serving and filing is seemingly predicated on a fundamental misinterpretation of the interplay between MCR 1.108(1), MCL 600.5838a and MCL 600.5856 and the caselaw interpreting those statutes. Although the Trial Court would not summarily dispose of Plaintiffs-Appellants' case, the Court of Appeals properly remedied the error and found that Plaintiffs-Appellants' action was untimely and summarily dismissed the action. (Appx. 157b). Thus, this Honorable Court should reach the same conclusion based on the analysis of either of the two main issues as set forth below.

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT PLAINTIFFS-APPELLANTS' SERVICE OF THE NOTICE OF INTENT WAS UNTIMELY AND DID NOT PROVIDE A TOLLING OF THE STATUTE OF LIMITATIONS

The Court of Appeals properly concluded that Plaintiffs-Appellants' decision to serve their Notice of Intent on December 26, 2013 did not provide timely notice of a pending claim within the two-year medical malpractice statute of limitations and therefore Plaintiffs-Appellants' were not afforded the 182-day tolling period as set forth by MCL 600.2912b. (Appx. 155b-157b). The Court of Appeals engaged in an analysis of the interplay between MCR 1.108(1), MCL 600.2912b, the statute governing the service of an NOI, and the tolling statute applicable to actions sounding in medical malpractice, MCL 600.5856. (Appx.151b-157b). Pertinent to the Court of Appeals' analysis was the recognition of how to review, interpret and apply both the Michigan Court Rules and Michigan statutes. (Appx.153b).

The primary goal of the reviewing court in interpreting a statute is to ascertain and give effect to the intent of the Legislature. *Mich Ed Ass'n v Secretary of State* (On Rehearing), 489 Mich 194, 217; 801 NW2d 35 (2011). The specific words of the statute provide the most reliable evidence of that intent. *US Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n* (On Rehearing), 484 Mich 1, 13; 795 NW2d 101 (2009). The Legislature is presumed to have intended the meaning it plainly expressed, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), and clear statutory language must be enforced as written, *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). Further, as stated by the Court of Appeals in its citation to *Velez v Tuma*, 492 Mich 1, 16; 821 NW2d 432 (2012), the court's "... function in construing statutory language is to effectuate the Legislature's intent." Further, if the statutory language is plain and clear, it must be enforced as written. *Id.* at 16-17. When called upon to interpret and apply a court

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

rule, this Court applies the principles that govern statutory interpretation. *Grievance Administrator v. Underwood,* 462 Mich 188, 193, 612 N.W.2d 116 (2000). Accordingly, this Court begins with the language of the court rule. *Id.* at 194, 612 N.W.2d 116.

MCR 1.108, Computation of time, states:

In computing a period of time prescribed or allowed by these rules, by court order, or by statute, the following rules apply:

> **(1) The day of the act, event, or default after which the designated period of time begins to run is not included.** The last day of the period is included, unless it is a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed.

There is no disagreement that a medical malpractice claim accrues, "at the time of the act or omission that is the basis for the claim of medical malpractice." MCL 600.5838a. The statute of limitations for claims asserting medical malpractice is two years. MCL 600.5805(6). A claimant who wishes to bring a lawsuit sounding in medical malpractice must file a Notice of Intent (NOI) prior to filing suit. MCL 600.2912b (1). This statute reads, in pertinent part:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section **not less than 182 days before the action is commenced**. [Emphasis added].

During this 182-day notice period, the statute of limitations is tolled. MCL 600.5856(c). As a general rule, exceptions, such as tolling, to statutes of limitations are strictly construed. *Lausman v Benton Twp.*, 169 Mich App 625, 629; 426 NW2d 729 (1988). More specifically, MCL 600.5856(c) provides as follows:

> At the time notice is given in compliance with the applicable notice period under Section 2912b, if during that period a claim would be barred by

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

> the statute of limitations or repose ... **the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.** [Emphasis added].

The Court of Appeals correctly stated that there is, again, no disagreement that Plaintiffs-Appellants' claim accrued on December 26, 2011, and, absent any type of tolling, the time-period for filing an action would have expired two years later, on December 26, 2013. (Appx. 151-157b). Plaintiffs-Appellants' chose to serve their NOI on December 26, 2013. (Appx. 21b-39b). There was nothing prohibiting Plaintiffs-Appellants from serving the NOI one, two, or even seven days before this "selected" date which would have granted Plaintiffs-Appellants a statutory tolling period. However, Plaintiffs-Appellants failed to do so.

The Court of Appeals, in light of the NOI and tolling statutes, applied MCR 1.108(1) and held that "[t]he day of the act, event, or default after which the designated period of time begins to run is not included." (Appx. 155b-156b). In computing a period of time demarcated by days, the 182-day notice period began on December 27, 2013, or, the day after the Plaintiffs-Appellants served their NOI on December 26, 2013. As such, the NOI did not serve to toll the statute of limitations pursuant to MCL 600.5856(c). (Appx. 151-157b). MCL 600.5856(c) strictly and expressly provides that the statute of limitations is tolled "[a]t the time notice is given in compliance with the applicable notice period under MCL 600.2912b, if during that period a claim would be barred by the statute of limitations or repose[.]" Per the interplay between MCR 1.108(1) and MCL 600.5856(c), tolling began on December 27, 2013; which is outside the prescribed two-year statute of limitations.

Generally, if a plaintiff serves a timely NOI before commencing a medical malpractice action, the statute of limitations is tolled during the waiting period for filing the

Complaint, despite the presence of defects in the NOI. *Bush v. Shabahang*, 772 N.W.2d 272, 484 Mich 156 (2009). However, if the NOI is not timely served, plaintiff's claim is time-barred. Despite Plaintiffs-Appellants' position that this current claim and time-frame analysis is akin to *DeCosta v Gossage*, 486 Mich 116, 782 NW2d 734 (2010), the *DeCosta* Court held that the statutory period of limitations is tolled despite defects in a NOI "*if a NOI is timely.*" *Id.* at 123, 782 N.W.2d 734 (emphasis added). Cf. *Tyra*, 498 Mich at 90–92, 869 N.W.2d 213 (discussing the application of MCL 600.2301 and the effect of failing to comply with the NOI statute). This is not a situation where the NOI is defective. This is a situation where the NOI was untimely as it was served after the expiration of the statute of limitations and thus tolling does not apply.

Pursuant to MCR 1.108, the service of an NOI on the last day of the limitations period is not sufficient to toll the statute of limitations "at the time notice [was] given," because, in order to toll the statute of limitations at that time, the limitations period must have been scheduled to expire *during* the 182–day notice period. See MCL 600.5856(c).

The Court of Appeals properly concluded that, pursuant to its application of MCR 1.108(1), MCL 600.2912b and MCL 600.5856, the untimely NOI served by Plaintiffs-Appellants did not toll the statute of limitations because it provided notice one day after the expiration of the statute of limitations. (Appx. 151b-157b). As a result, Plaintiff-Appellants' lawsuit is time-barred by the statute of limitations and thus the Court of Appeals decision should be affirmed. (Appx. 151b-157b).

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

II. EVEN ASSUMING THAT THE NOI WAS TIMELY SERVED AND PROVIDED TOLLING OF THE STATUTE OF LIMITATIONS, PLAINTIFFS-APPELLANTS' ACTION IS *STILL* TIME BARRED.

Even if this Honorable Court were to assume that Plaintiffs-Appellants' NOI was timely served and tolled of the statute of limitations, Plaintiffs-Appellants *still* failed to file a timely action. In a medical malpractice action, a claimant normally has two years from the time his claim accrues to commence a suit; however, the two-year period of limitations is tolled during the 182-day notice period. *Tyra v. Organ Procurement Agency of Michigan* 869 N.W.2d 213, 498 Mich 68 (2015). If a Notice of Intent pursuant to MCL 600.2912b is served within the tolling period, a plaintiff is afforded 182 days plus the number of days of the tolling to timely initiate their lawsuit. This procedure is neither a novel nor new interpretation of the statutory law underlying malpractice cases and abundant case law exists setting forth same.

In this matter, Plaintiffs-Appellants served their NOI on December 26, 2013, then filed suit exactly 183 days later. (Plaintiffs' NOI: Appx. 21b-39b, Plaintiffs' Complaint: Appx. 1b-20b). Even assuming a timely NOI, Plaintiffs-Appellants filed suit one day too late and dismissal and affirmation of the Court of Appeals' decision is warranted.

A. If A Notice of Intent Is Timely Served, The Statute of Limitations Is Tolled No More Than 182 Days Plus The Number of "Tolling Days."

Pursuant to the plain language of MCL 600.2912b, when an NOI is served within the two-year period of limitations the statute of limitations is tolled for 182 days. Following the tolling period, the statute of limitations resumes running for that number of days equal to those, "remaining in the applicable notice period after the date notice is given." Here, Plaintiffs-Appellants argue that they provided notice to Defendants-Appellees on the last remaining day in applicable notice period. (Appx. 92b-103b, 132b-138b). Assuming this

were true, there would be zero days of tolling afforded to Plaintiffs-Appellants. Therefore, the statute of limitations was tolled for no longer than *zero days* after the 182-day tolling period expires.

B. Plaintiffs-Appellants' Untimely Served Their NOI And Commenced An Untimely Suit 183 Days Thereafter.

The applicable dates in this case are not in dispute; rather it is their significance that is the basis of the underlying Appeal. The date a Notice of Intent is mailed determines the 182-day notice period. *DeCosta v Gossage*, 486 Mich 116, 782 NW2d 734 (2010). The plaintiff bears the burden to establish compliance with MCL 600.2912b in commencing the action. *Roberts v Mecosta Co Gen Hosp* (After Remand), 470 Mich 679, 691; 684 NW2d 711 (2004) (Mecosta II). *Glisson v Gerrity*, 480 Mich 883; 738 NW2d 237 (2007).

This claim accrued on the date that the CT was allegedly negligently read, December 26, 2011. (Appx. 1b-20b, 21b-39b). The NOI was untimely served on December 26, 2013. (Appx. 21b-39b). Setting aside the Court of Appeals' well-reasoned holding and accepting Plaintiffs-Appellants' argument that their NOI served to toll the statute of limitations; day one of the 182-day tolling period began on December 27, 2013, and day 182 of the tolling period fell on Thursday, June 26, 2014. Plaintiffs-Appellants filed their untimely malpractice lawsuit on Friday, June 27, 2014; or, 183-days after serving their Notice of Intent. (Appx.1b-20b). For this Honorable Court's quick reference, the following table identifies the dates and events pertinent to this appeal:

GMH GIARMARCO, MULLINS & HORTON, P.C. ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

Date	Event
12/26/11	Alleged Malpractice/Accrual
12/26/13	Notice of Intent Served
6/26/14	182-day Tolling Period Ends* (assuming NOI tolled SOL)
6/27/14	Complaint Filed

C. Plaintiffs-Appellants' 6/27/14 Lawsuit Was Untimely.

Even accepting Plaintiffs-Appellants' argument regarding tolling, their lawsuit was *still* not timely filed because the statute of limitations expired one day before they filed suit. A medical malpractice claim is timely if it is filed within two years and 182 days of the accrual date. *Kincaid v Cardwell*, 300 Mich App 513, 524; 834 NW2d 122 (2013). Even assuming Plaintiffs-Appellants timely served their NOI, there were zero days left remaining in the statute of limitations. Under this rationale, the statute of limitations began tolling, with day 1 of the tolling period falling on December 27, 2013, and day 182 of the tolling period falling on June 26, 2014. Plaintiffs-Appellants were required to wait "not less than 182 days before" commencing their action. MCL 600.2912b(1). During that time, the statute of limitations was tolled, "**not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given**." MCL 600.5856(c), emphasis added.

The plaintiff in a medical malpractice action bears the burden of establishing compliance with requirements for the Notice of Intent (NOI) to file the action, including, but not limited to substance and timeliness of the same. *Ligons v. Crittenton Hosp.*, 776 N.W.2d 361, 285 Mich App 337, appeal granted 783 N.W.2d 101, 486 Mich 977, *affirmed* 803 N.W.2d 271, 490 Mich 61 (2009). Accordingly, even assuming Plaintiffs-Appellants' argument that they timely served an NOI, Plaintiffs-Appellants' have the

GMH GIARMARCO, MULLINS & HORTON, P.C. ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

ultimate burden to establish that compliance with MCL 600.2912b occurred in this case. They have failed to meet their burden.

Assuming Plaintiffs-Appellants were afforded tolling, Plaintiffs-Appellants' suit ripened on day 182 after the service of the NOI: Thursday, June 26, 2014. The SOL was tolled for *zero* additional days because there were no days remaining in the applicable notice period due to the filing of the NOI on the very last day possible based on the December 26, 2011 accrual date.

This calculation is demonstrated by *Kincaid, supra* which utilized an analysis that worked backwards from the date of filing suit. In *Kincaid*, the NOI was served on April 5, 2010, and the Complaint was filed on November 30, 2010. In calculating the applicable limitations date (and ultimately determining the case to be untimely), the Court of Appeals stated that, "if her medical malpractice claim accrued on or after June 1, 2008, which is two years and 182 days before the date she filed her Complaint, her claim would be timely. If, however, it accrued before that date, it would be barred under MCL 600.5805(1)." *Id.* at 524. Because plaintiff's Complaint was untimely based on the accrual date, it was dismissed. The Court stated that if the patient's claim accrued on or after June 1, 2008, it would have been timely. *Id.* at 524. This analysis supported Defendants contention that the instant lawsuit is untimely by virtue of the math involved:

6/1/10 + 182 days: November 30, 2010
6/1/10 + 183 days: December 1, 2010

Thus, Plaintiffs-Appellants' reliance upon this case is misplaced.

The same analysis applies herein; and Defendants-Appellees can utilize the identical analysis to conclude that Plaintiffs-Appellants' lawsuit is *still* time barred. The date of filing suit was June 27, 2014. (Appx. 1b-20b). Subtracting two years and 182 days

from that date leads to the date of December 27, 2011. The claim accrued on December 26, 2011, and therefore, pursuant to *Kincaid*, the instant case is untimely. The legal rationale behind the *Kincaid* Court's analysis is predicated upon a fundamental understanding of the interplay between MCL 600.5838a, MCL 600.5805(6), and MCL 600.2912b.

Michigan statutes MCL 600.5838a, MCL 600.5805(6), MCL 600.5856(c), and MCL 600.2912b provide precise parameters in which a medical malpractice case shall be filed. These factors can be summarized in the following 4-step analysis that every litigant must take to ensure that their medical malpractice claim is timely:

Step 1 Determine the accrual date, *i.e.*, the date of the act/omission that allegedly constitutes medical malpractice. MCL 600.5838a(1).

Step 2 Determine when the statute of limitations expires, *i.e.*, two years after the accrual date for a medical malpractice action. MCL 600.5805(6).

Step 3 Serve the NOI, within the statute of limitations, and "not less than 182 days before the action is commenced." MCL 600.2912b(1).

Step 4 Determine if statutory tolling applies and if so, determine when the tolled statute of limitations expires. According to MCL 600.5856(c), "the statute [of limitations] is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given."

Plaintiffs-Appellants seemingly agree with the above steps with the following caveats: they believe that suit cannot be filed until a full 182 days has passed. This interpretation disregards the plain statutory language which states that Plaintiffs-Appellants' NOI must be served "not less than 182 days before the action is commenced." MCL 600.2912b(1). Although obvious, it bears repeating that 182 days equates to "not less than 182 days."

GMH GIARMARCO, MULLINS & HORTON, P.C. ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▸ 101 West Big Beaver Road ▸ Troy, Michigan 48084-5280 ▸ P: (248) 457-7000 ▸ F: (248) 457-7001 ▸ www.gmhlaw.com

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

Hinging upon this erroneous interpretation of MCL 600.2912b(1), Plaintiffs-Appellants advance the argument that when an NOI is served on the date that the statute of limitations is set to expire, the statute is tolled a full 182 days, affording for the filing of the case on the next day, day 183. This creative and inaccurate argument does not pass legal muster and more importantly, nullifies the calculations done by Michigan's higher Courts in a myriad cases (including *Kincaid*) with respect to statutes of limitations in malpractice cases.

Plaintiffs-Appellants' argument, at its essence, is that an NOI served on the date that the statute of limitations would expire has the benefit of an additional full day to file a Complaint. This ignores the plain language of two statutes, MCL 600.2912b, and MCL 600.5856(c). The former states that the notice period is, "not less than 182 days," and the latter states that the statute is tolled, "not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." Notice was allegedly given on December 26, 2013; day 1 of the tolling period started on December 27, 2013; day 182 of the tolling period fell on June 26, 2014. At that time, Plaintiffs-Appellants could file suit on June 26, 2014, because day 182 of the tolling period fell on, "not less than 182 days." But that also meant that after that date, the statute remained open for zero days.

The Michigan Court of Appeals addressed the issue of *when* the tolled statute of limitations expired in the instance of a Plaintiff-Appellant who served a Notice of Intent on the last day of the period limitations, in the case of *Dewan v Khoury*, Unpublished Opinion Per Curiam of the Court of Appeals, issued March 28, 2006 (Docket No. 265020), leave denied, 477 Mich 888 (2006), which is attached as (**Exhibit 8**, Appx. 176b-177b). In

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

Dewan, the Plaintiff-Appellant served an NOI precisely two years after the date of accrual/loss (alleged malpractice occurred June 4, 2002; NOI served June 4, 2004). *Id.* The *Dewan* Plaintiff-Appellant filed suit one business day after the 182-day period ended, just as Plaintiffs-Appellants did in the case at bar. *Id.* The Trial Court granted summary disposition pursuant to MCR 2.116(C)(7), ruling that Plaintiffs-Appellants' Complaint was barred by the statute of limitations because the Complaint was filed the next business day after expiration of the entire 182-day period. *Id.* Plaintiffs-Appellants appealed and the Court of Appeals affirmed the dismissal. *Id.*

The *Dewan* Court reasoned that since Plaintiff-Appellant served the Notice of Intent two years from the date of the alleged malpractice, when the 182-day tolling period expired, the statute of limitations did not resume running, and Plaintiff-Appellant had no time remaining in which to file suit. *Id.* The Court further held that no portion of the limitations period remained after the Notice of Intent was expired, because the 182-day tolling period had passed in its entirety. *Id.* The Court stated:

> Moreover, contrary to Plaintiff-Appellant's assertion, the Trial Court's decision did not shorten the NOI period to 181 days. Plaintiff-Appellant chose to wait until the last day of the limitations period in order to serve the NOI. The entire 182-day period elapsed in this case, but Plaintiff-Appellant's act of serving the NOI on the last day of the limitations period ensured that no time would remain in the limitations period when the 182-day period expired.
>
> *Id. (Emphasis Added).*

The current case is identical in every material respect to *Dewan* and mandates dismissal of this matter as Plaintiffs-Appellants' lawsuit is untimely. Plaintiffs-Appellants chose to not only serve an untimely NOI, but, also chose to file an untimely Complaint even assuming a tolling period applied.

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

Plaintiffs-Appellants have advanced the argument that because *Dewan* was released at a time that a former version of MCL 600.5856(c) was in place, it was inapplicable. (Appx. 92b-103b, 132b). Notwithstanding that the statutory language change from the prior version of the statute to the current version was immaterial to the issue at hand, there is case law supporting Defendants-Appellees' position that was promulgated after the change of the statutory language. *Kincaid* was decided in 2013, and its analysis supports Defendants-Appellees.

Additionally, in *Lancaster v Wease* (**Exhibit 9,** Appx. 178b-179b), the Court of Appeals endorsed the reasoning of *Dewan,* and it was decided under the current version of MCL 600.5856.

Lancaster completely undermines the Plaintiffs-Appellants' argument that serving an NOI on the last day of the statute of limitations tolls the statute by a single day (as Plaintiffs-Appellants urge), as the Court in that case determined that serving the NOI the day before the statute of limitations expired provided only one day to file the Complaint. Analyzing the interplay between MCL 600.5856(c) and MCR 1.108(1), the *Lancaster* Court explained the following:

> Here, the alleged malpractice occurred during plaintiff's gastric bypass surgery on November 29, 2005. **Absent tolling, the period of limitations on plaintiff's malpractice claim would have expired on November 29, 2007. MCR 1.108(3); MCL 600.5805(6). Plaintiff served her notice of intent to file a malpractice claim on November 28, 2007.** Under MCL 600.5856(c), if the period of limitations would expire during the 182-day notice period (which it did in the instant case), the period of limitations is tolled "not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." **Here, the tolling period began running on November 29, 2007. MCR 1.108(1). When the notice period expired on May 28, 2008, the period of limitations resumed running and expired one day later on May 29, 2008, because only one day in the limitations period had remained when the notice of intent was served.** *Id.* at p 2-3.

Thus, because the *Lancaster* Plaintiff-Appellant served her NOI *one day before the statute of limitations expired, she had one day remaining to file her Complaint.* The same would have been true here, had Plaintiffs-Appellants served with one day remaining; they did not—they served their NOI with zero days remaining within the statute of limitations. The only day on which they could have filed, June 26, 2014 (day 182), elapsed without the filing of a Complaint.

Plaintiffs-Appellants incorrectly contend that they had an extra day to file their Complaint under MCL 600.5856(c), MCR 1.108(1), and MCL 600.2912b, and that immediate tolling left *one* remaining day in the statute of limitations for filing after the 182-day notice period. (Appx. 92b-103b, 132b-143b). This runs contrary to MCL 600.5856(c), which clearly states, "[t]he statute is not tolled longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." Zero days remained at the time the NOI was served-not one; thus, Plaintiffs' argument fails.

Plaintiffs-Appellants then attempt to resurrect their claim by pointing to *Burton v Macha*, 303 Mich App 750; 846 NW2d 419 (2014). *Burton* involved the interplay of the filing of suit pursuant to the statute of repose, wrongful death savings provision, and discovery rule; none of these issues are at play in this matter. *Burton* neither addressed nor provided a holding about the tolling of NOIs served on the last day of the statute of limitations, with zero days left; it did, however, dismiss that claim because tolling did not apply to the statute of repose. Nonetheless, in that case the NOI was served on December 16, 2010, and the Court noted that the plaintiff could not file suit until June 17, 2011 (182 days) fully passed. Notwithstanding that the *Burton* Court dismissed that claim,

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

it did not address the sentinel issue at hand: what to do with a tolled case where zero days remain in the statute of limitations. The Court of Appeals addressed this precise issue in *Dewan v Khoury*, as discussed above. Plaintiffs-Appellants have yet to provide any law that expressly contradicts same.

Plaintiffs-Appellants citation to *DeCosta v Gossage,* 486 Mich 116 (2010), fails to address the timeliness and tolling issue as is present in this case. Rather, *DeCosta* addressed *where* an NOI must be sent and whether an NOI sent to an incorrect address serves to toll the statute of limitations. Of note, the lawsuit in *DeCosta* was filed *170 days* after the NOI was served, presumably because there was no response to the NOI. As such, *DeCosta* is likewise inapplicable to the instant lawsuit and offers nothing of value to the analysis of the issue at hand.

Finally, Plaintiffs-Appellants' citation to *Driver v Naini,* 490 Mich 239 (2011), fails to support their position. In *Driver*, the plaintiff unsuccessfully attempted to add a new defendant after suit was filed and after the statute of limitations had expired. In that case, the original suit was filed with less than 182 days passing from the service of the NOI, as the NOI was served on April 25, 2006, and the Complaint was filed 181 days later, on October 23, 2006. Notably, the Court did state that when, "a claimant files a NOI with time remaining on the applicable statute of limitations, that NOI tolls the statute of limitations for up to 182 days with regard to the recipients of the NOI." *Id.* at 249. In this case, the NOI was allegedly served with no time remaining on the statute, and therefore the statute would not be tolled any longer as urged by the Plaintiffs-Appellants in this matter.

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

Plaintiffs-Appellants' Brief attempts to persuade this Honorable Court to accept their erroneously calculated dates to preserve their untimely claim by relying upon mistaken interpretations of law. The claim accrued on December 26, 2011; the NOI was served on December 26, 2013; and the Complaint was untimely filed on June 27, 2014.

Plaintiffs-Appellants next argue that the 2004 amendment to MCL 600.5856 changed the calculation of tolling, and thus the statute of limitations, to make their June 27, 2014 filing timely. This amendment added the words, "at the time notice is given," to explicitly indicate when the statute of limitations would be tolled. However, this amendment has no bearing on the calculation at hand other than to reinforce that the Complaint was untimely as follows. Tolling began the date that the NOI was served, December 26, 2013; at a time when zero days were left in the statute of limitations. Day 1 of the 182-day period began on December 27, 2013, and day 182 ended on June 26, 2014. Because zero days remained in the statute of limitations period, once the 182 days expired, the statute of limitations immediately expired. Plaintiffs-Appellants were not given an additional day to file suit and their argument is bereft of law explicitly holding same.

Plaintiffs-Appellants incorrectly contend that they had an extra day to file their Complaint under MCL 600.5856(c), MCR 1.108(1), and MCL 600.2912b, and that immediate tolling left *one* remaining day in the statute of limitations for filing after the 182-day notice period. (Appx). This runs contrary to MCL 600.5856(c), which clearly states, "The statute is not tolled longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." Zero days

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

remained at the time the NOI was served, not one; thus, Plaintiffs-Appellants' argument fails.

Finally, Plaintiffs-Appellants' attempt to salvage their claim by arguing that it accrued one day after the alleged act giving rise to their claim. (Appx. 92b-103b, 132b-143b). This runs contrary to the established language of MCL 600.5838a(1), which provides that a malpractice claim, "accrues at the time of the act or omission that is the basis for the claim of medical malpractice." Defendants-Appellees urge this Honorable Court to summarily reject this argument.

Further, Plaintiffs-Appellants' citation to *Swanson v Port Huron Hospital,* 290 Mich App 167 (2010) addressed an NOI that was defective pursuant to MCL 600.2912b, and more specifically, the issue of whether or not plaintiff set forth with the necessary specificity the alleged breaches of the standard of care and resultant proximate causation. The Court of Appeals ultimately concluded that the plaintiff made a good faith attempt to satisfy MCL 600.2912b and found the NOI to be sufficient. Timeliness and tolling are not addressed in the holding of this case, and the fact section of the case failed to provide any specific dates (months only), upon which the Court could seek any particular guidance in this matter.

Additionally, Defendants-Appellees do not wish to be cumulative or repetitive in their argument; however, it bears noting that Plaintiffs-Appellants' Trial Counsel in the instant case was well-aware of the calculation issues involved, having been the subject of a 2014 Michigan Court of Appeals' Opinion issued nearly three months' prior to the filing of the underlying Complaint in this matter addressing the timeliness of a malpractice claim. In *Hardin v Prieskorn,* Unpublished Opinion Per Curiam of the Court of Appeals,

GMH GIARMARCO, MULLINS & HORTON, P.C. ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

issued April 1, 2014 (Docket No. 311193), which is attached as (**Exhibit 10**, Appx. 180b-182b). The attorney representing the Plaintiff-Appellant at the Trial Court level in this matter was faced with an accrual date of August 3, 2009. Thus, the NOI would have been served no later than August 3, 2011, although the opinion does not delineate when it was served. Nonetheless, the Court of Appeals found Plaintiff-Appellant's Complaint untimely, and in so doing, commented that the two-year limitations period with tolling expired on **February 1, 2012**, which was 182 days (not 183) after the last possible date that the NOI could be served. So, even assuming Plaintiffs-Appellants' NOI argument that the NOI was timely served, Plaintiffs-Appellants filed suit too late.

X. CONCLUSION

In sum, the cases cited by Plaintiffs-Appellants in their Brief do not support their position that this lawsuit was timely filed, nor do they even lend supportive commentary to the arguments made on behalf of Plaintiffs-Appellants. Dismissal of a medical malpractice Complaint is an appropriate remedy for the Plaintiffs-Appellants' noncompliance with the notice provisions. *Furr v. McLeod,* 848 N.W.2d 465, 304 Mich App 677, reversed in part 869 N.W.2d 213, 498 Mich 68 (2014). Plaintiffs-Appellants failed to timely file their Complaint, and the dismissal of the same should be affirmed.

For the reasons as set forth above, the Court of Appeals properly reversed the Trial Court and summarily dismissed Plaintiffs-Appellants' untimely claim based upon a failure to serve a timely Notice of Intent. Further, even assuming Plaintiffs-Appellants' argument that the NOI was timely served and tolling applied in this matter, Plaintiffs-Appellants and the Trial Court erroneously determined that an NOI served within the statute of limitations affords an additional day to file suit after 182 days elapses, or at 183

days. This is not supported by statutes or case law and, even with tolling, Plaintiffs-Appellants' untimely claim *still* warrants dismissal.

WHEREFORE, Defendants-Appellees respectfully request that this Honorable Court dismiss Plaintiffs-Appellants' claim as the same is untimely.

Respectfully submitted,

GIARMARCO, MULLINS & HORTON, P.C.

By: /s/ Jared M. Trust
LeROY H. WULFMEIER, III (P22583)
JARED M. TRUST (P72993)
Attorneys for Defendants-Appellees
101 W. Big Beaver Rd., Tenth Floor
Troy, MI 48084-5280
(248) 457-7000

Dated: February 24, 2017

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

EXHIBIT 1

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JEFFREY HAKSLUOTO
and CAROL HAKSLUOTO,

Plaintiffs,

vs. Case No. 2014-2556-NH

MT. CLEMENS REGIONAL MEDICAL
CENTER, N/K/A MCLAREN MACOMB,
GENERAL RADIOLOGY ASSOCIATES, P.C.,
and ELI SHAPIRO, D.O.,

Defendants.
_____/

OPINION AND ORDER

This matter is before the Court on defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10).

I.

This case involves a claim of medical malpractice alleging a failure to properly and timely diagnose Mr. Haksluoto on December 26, 2011. Two years later, on December 26, 2013, plaintiffs sent defendants their Notice of Intent to sue. On June 27, 2014, plaintiffs filed their complaint. Defendants now move for summary disposition asserting that plaintiffs' claim is barred by the two year statute of limitations for medical malpractice claims.

II.

MCR 2.116(C)(7)

The statute of limitations is properly raised under MCR 2.116(C)(7). A motion under MCR 2.116(C)(7) may be supported by affidavits, admissions, or other documentary evidence and, if submitted, must be considered by the court. *Patterson v Kleiman*, 447 Mich 429, 432, 526

NW2d 879 (1994). This Court must take the well-pleaded allegations in the pleadings and the factual support submitted by the nonmoving party as true, and summary disposition is proper only if the moving party is then shown to be entitled to judgment as a matter of law. *Home Ins Co v Detroit Fire Extinguisher Co*, 212 Mich App 522, 527-528; 538 NW2d 424 (1995).

MCR 2.116(C)(8)

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim on which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006). A motion for summary disposition brought under MCR 2.116©(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129-30; 631 NW2d 308 (2001). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Carter*, *supra* at 427. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

MCR 2.116(C)(10)

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The court must only consider the substantively

admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.* at 121.

III.

Defendants assert that plaintiffs served their Notice of Intent on December 26, 2013, two years after the date of the alleged malpractice. Defendants claim that the statute of limitations expired 182 days later, on June 26, 2014. Defendants argue that because plaintiffs did not file their complaint until June 27, 2014, the statute of limitations had expired and the complaint was not timely filed. Therefore, defendants contend that they are entitled to summary disposition of plaintiffs' claims.

For their part, plaintiffs argue that their complaint was timely filed because MCL 600.5856 tolls the statute of limitations "at the time" the NOI is mailed. Plaintiffs assert that the statute was immediately tolled on December 26, 2013, and that the final day of the limitations period still remained available to file a complaint after the 182-day notice period. Plaintiffs aver that MCR 1.108(1) requires that the 182-day period of tolling begin the day after mailing and includes the "last day of the period." To that end, plaintiffs assert that the 182-day period is computed to begin December 27, 2013, the day after the Notice of Intent was mailed to defendants, and includes June 26, 2013 in the tolling period. Consequently, plaintiffs argue they properly filed their complaint on June 27, 2014, the single remaining day of the limitations period.

IV.

The statute of limitations for medical malpractice claims is two years. MCL 600.5805(6). A medical malpractice claim accrues at the time of the act or omission that is the basis for the claim. MCL 600.5838a(1). Therefore, absent tolling, the period of limitations on plaintiffs'

malpractice claim would have expired on December 26, 2013, two years after the date in which there was an alleged misinterpretation of a radiology report on December 26, 2011.

A claimant who wishes to bring a lawsuit alleging medical malpractice against a health professional or health facility must serve a Notice of Intent apprising them of the nature of the claims asserted no less than 182 days before the action is commenced. MCL 600.2912b(1). MCL 600.5856(c) provides:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> **At the time notice is given** in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, **the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.**

(Emphasis Added).

Prior to its amendment in 2004, this provision provided:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

[MCL 600.5856(d).][1]

In this case, plaintiffs mailed their Notice of Intent on December 26, 2013. Accordingly, the first day of the 182-day notice period was December 27, 2013, the date after notice was given. MCL 600.5856(c); MCR 1.108(1). When the notice period expired on June 26, 2014, the period of limitations resumed running. However, because plaintiffs filed their Notice of Intent on

[1] 2004 PA 87 amended MCL 600.5856. The amendment deleted previous subsection (c).

the last day of the statute of limitations, there is a question of whether on the date of June 27, 2014 the plaintiffs had any time remaining in which to file their complaint.[2]

The foremost rule of statutory interpretation "is to discern and give effect to the intent of the Legislature." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). Each word or phrase of a statute is given its commonly accepted meaning, unless a word or phrase is expressly defined, and then courts must apply it in accordance with that definition. *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). Unambiguous language is given the intent clearly expressed and the statute is enforced as written. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). Judicial construction of unambiguous language is not permitted. *Id.* Interpretation strives to give effect to each phrase, clause or word in a statute. *Id.* at 237. "To discern the true intent of the Legislature, the statutes must be read together, and no one section should be taken in isolation." *Apsey v Memorial Hospital*, 477 Mich 120, 132 n 8; 730 NW2d 695 (2007).

In 2004, the Legislature amended MCL 600.5836(c) and inserted a new phrase which provided that the statute of limitations is to be tolled "at the time notice is given." Although the Legislature inserted this new phrase seemingly providing that tolling of the statute was to begin at the moment the Notice of Intent was mailed, the second portion of the provision remained unaltered and provides that the statutory 182-day tolling period commences "after the date notice is given." MCL 600.5836(c).

[2] Defendants relied upon *Dewan v Khoury*, unpublished opinion per curium Court of Appeals, issued March 28, 2006 (Docket No. 265020). However, *Dewan* is readily distinguishable from the case at hand as the decision was analyzed under a previous version of MCL 600.5856, which did not provide that the tolling of the statute of limitations begins "at the time notice is given."

The Court finds that when read as a whole, MCL 600.5856(c) provides that the statute of limitations is tolled immediately "at the time notice is given" and remains tolled for 182 days beginning "after the date notice is given." MCL 600.5856(c). In other words, although tolling of the statute of limitations occurs the moment the Notice of Intent is served, neither the final provision of MCL 600.5856(c) or MCR 1.108(1) counts the first of the 182 days until the next full day is complete. This interpretation does not transform the 182-day notice period to 183 days. Rather, this interpretation preserves MCL 600.5856(c)'s mandate that the statute of limitations be tolled "at the time notice is given," and reconciles this provision with the second portion of the statute and MCR 1.108(1).

In this case, plaintiffs mailed their Notice of Intent on December 26, 2013, the last date of the two year statute of limitations. The statute of limitations was immediately tolled, and that final day of the limitations period still remained available to file a complaint after the 182-day notice period expired. The 182-notice period began on December 27, 2013. MCL 600.5856(c); MCR 1.108(1). When the notice period expired on June 26, 2014, the period of limitations resumed running. Therefore, plaintiffs properly filed their complaint on June 27, 2014, the last day remaining under the statute of limitations following the 182-day tolling period. Accordingly, defendants' motion for summary disposition is properly denied.

V.

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary disposition is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED:

DATED:

Peter J. Maceroni
Circuit Judge

PETER J. MACERONI
CIRCUIT JUDGE

SEP 16 2014

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk

cc: Daniel Rucker
Jared Trust

EXHIBIT 2

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

JEFFREY HAKSLUOTO and
CAROL HAKSLUOTO,

Plaintiffs,

vs. Case No. 14-2556-NH

MT. CLEMENS REGIONAL MEDICAL
CENTER N/K/A MCLAREN MACOMB,
GENERAL RADIOLOGY ASSOCIATES,
P.C., and ELI SHAPIRO, D.O.,

Defendants.
_____/

PROCEEDINGS

BEFORE THE HONORABLE PETER J. MACERONI (P-16922), JUDGE

Mount Clemens, Michigan - Monday, August 11, 2014

APPEARANCES:

For the Plaintiff(s): DANIEL W. RUCKER (P-67832)
1760 S. Telegraph Road, Ste 300
Bloomfield Hills, MI 48302-0183
(248) 335-5000

For the Defendant(s): JARED M. TRUST (P-72993)
101 W. Big Beaver Road
10th Floor Columbia Center
Troy, MI 48302-0183
(248) 457-7074

Susan L. Hassig, CSR-0939
Official Court Reporter
40 North Main Street
Mount Clemens, MI 48043
(586) 469-5851

TABLE OF CONTENTS

Page

WITNESSES:

(No witnesses offered)

EXHIBITS: Received

(No exhibits offered)

Mount Clemens, Michigan

August 11, 2014

At about 9:10 a.m.

- - -

THE CLERK: Haksluoto versus Mount Clemens General.

MR. TRUST: Good morning, your Honor. Jared Trust appearing on behalf of the defendants, Mount Clemens Regional Medical Center.

MR. RUCKER: And, your Honor, Daniel Rucker here on behalf of plaintiffs, Haksluoto.

MR. TRUST: And, Judge, today this is our Motion for Summary Disposition as set forth in the underlying motion and the replies to plaintiff's response, pursuant to C(7), C(8) and C(10). I am aware that the Court has had an opportunity to review the pleadings, the exhibits and so forth. What I just want to highlight is actually what was set forth in our reply. Plaintiff's reliance upon the Burton case as set forth in their response is actually two-fold. It is misplaced simply because that case dealt with Statute of Repose and wrongful death as well as the Court of Appeals did not address the tolling period, the 182-day period that we have set forth here.

In furtherance, plaintiff's response indicates -- well, the statute was amended in 2004 so our reliance upon anything beforehand is actually misplaced. We have attached to our reply the Lancaster case which is actually a 2011 case specifically discussing the 182-day tolling period. It is not 183 days, it is 182 days. Albeit one day, the Lancaster case actually analyzed this one day failure to timely file the Complaint after the Notice of Intent was served and dismissed plaintiff's lawsuit with prejudice. We are under a similar situation in this case, whereas the date of loss occurred December 26th, 2011, the Notice of Intent was served exactly two years after that on December 26th, 2013, the tolling period of 182 days, again, not 183 days, began on the day that the NOI, excuse me, the one day after the NOI was served. The Statute of Limitations would thus bar any matters filed after June 26th of 2014, and plaintiff's Complaint was filed on June 27th, 2014.

Although this is a procedural challenge to the Complaint under C(7) and C(8), this is a challenge that has been upheld by both a Court of Appeals decision before the amendment and after the amendment, and plaintiff is unable to cite to

anything after the amendment that supports the fact that this Statute of Limitations and the tolling period is actually 183 days.

So for that reason, Judge, we are asking that the plaintiffs' Complaint be summarily dismissed with prejudice under C(7) and C(8).

THE COURT: Lancaster is not a published opinion, correct?

MR. TRUST: It is not a published opinion and nor is Burton, Judge.

THE COURT: Okay.

MR. RUCKER: Burton is a published opinion. I would like to -- the last thing I am going to show you is why Lancaster supports plaintiffs, but I want to go through this systematically.

First, we served the NOI on December 26th, we had a 182-day period that ran from December 27th and that included June 26th, we couldn't file in any point in that period, and then we filed the Complaint on June 27th. Every day in that period was tolled from filing the NOI, the 182-day period that followed, and then filing the Complaint on the 27th of June. Every day was tolled. We still have a day left on the Statute of Limitations today, your Honor.

I did point to, in the reply brief Counsel

says there is nothing that we have cited that, that refutes Dewan in any way. Dewan was a case they cited that dealt with the old version of the statute that said basically if you file the NOI -- you serve the NOI on the last day of the Statute of Limitations, you have zero days left.

Well, I cited to Bush versus Shabahang which says that at the time the NOI is served in compliance with the statute, the statute is tolled, not the statute will be tolled or is tolled the next day or tolled a week later; the statute is tolled.

I have also grabbed a couple of other published cases, your Honor, and I have copies of them here, but for instance, Decosta versus Gossage, 486 Michigan 116, says the current statute MCL 600.5856(C) now makes clear that whether tolling applies is determined by the timeliness of the NOI. Thus, if an NOI is timely the period of limitations is tolled despite defects contained therein. The defects had to do with whether they had met all the requirements of an NOI. But what they are saying there is if the NOI is timely, the period of limitations is tolled, same thing as in Bush versus Shabahang. They go on to talk about how exceedingly exacting interpretations of the NOI mandates aren't

what the statute initially called for and that's not what the Supreme Court is going to enforce. And they go on later and refer to MCL 600.2301 which says that, the Court says that errors or defects in the proceedings shall be disregarded. I cite to that because plaintiff's -- or defendant's interpretation of Burton is that we were actually a day early based on their interpretation. MCL 600.2301 would say that that's not a violation of substantial rights to Decosta and other courts that have interpreted that recently in published opinions, say if you are a little early, a day early then it doesn't affect substantial rights, so that's why I point that out.

But another case, Kincaid is a published case, that is Kincaid versus Cardwell, 300 Mich. App. 513. In that case, the Court says the period of limitations is tolled for the 182-day notice period but only if the plaintiff gave notice before the -- before the expiration of the period of limitations; not 2 days before, not 3 days before, just before the expiration. And in that case they go on, they say the earliest accrual date was April 25th, 2008. The earliest time the Statute of Limitations could have accrued was April 25th. And she gave her notice to sue within 2 years of that

date. As such, she was entitled to the full 182 days of tolling. Two years from the date of accrual, she did it within that time period, she was entitled to tolling. The Court wouldn't say that in a published opinion if they actually had to file it or serve the notice a day early.

Again, another case, Driver versus Naini is 490 Michigan 239, and in there the Supreme Court again says when a claimant files an NOI with time remaining on the applicable Statute of Limitations, that NOI tolls the Statute of Limitations for up to 182 days with regard to the recipients of the NOI. The Court wouldn't have said that if you had to file a day early.

THE COURT: Well, in that example, let's say you filed the NOI 5 days before the statute runs, you have 182 days plus 5.

MR. RUCKER: Correct.

THE COURT: Correct?

MR. RUCKER: Correct. And then I've got one more example, your Honor, Swanson versus Port Huron Hospital, that's 290 Mich. App. 167. The Court points to MCL 588.56(C) and says this provides that the period of limitations is tolled at the time notice is given. So they are saying, when you give

that notice, when you mail that notice, it is tolled and that's been our argument, that's the key distinction between Dewan, which is citing a statute that didn't include that at the time language, and post the amendment where they say at the time the statute is tolled. Dewan, Dewan said you have 0 days left because the Statute of Limitations continues to run the day that you serve the NOI. That's no longer the case. And I've cited to the accrual statute at 600.5838(A) which also uses the language at the time of the act or omission by the doctor or the dentist or whoever, that's when the statute begins to accrue. So if they -- if they did something wrong, and at the time means a day later, then we would have not until December 26th to have filed our Complaint, that wouldn't be the end of the Statute of Limitations, December 27th would be. If you interpret at the time as meaning a day later, we're still in time. We still have an extra day.

And, your Honor, I cited to Crockett, Burton, and I would like to review Lancaster. Crockett was prior to the amendment. What Bush versus Shabahang says is that the amendment actually clarified the proper interpretation. Crockett was prior to the amendment, and what they held there was

the NOI was filed on the last day of the Statute of Limitations, and they said under their, under their reasoning you had 182 days. After that, starting the day after it was tolled, the final 102-day -- 182nd day it was also tolled and then you could file your Complaint one day later, which happened to be a Saturday in that case, so the 183rd day you filed, they gave them until the Monday. But what they said is if you file on the last day of the Statute of Limitations, then you get 182 days and you file on the 183rd possible day, which would have been a Monday in that case.

Burton was a case that does stand, does deal with the Statute of Limitations repose, but the reason I cited it is a published case that shows how to calculate this 182 days, and it is, it's very similar to the time period we have.

In that case, they were looking at December 16th the NOI was served. In our case, we are looking at December 26th the NOI was served. In that case they said the period of -- the notice period expires December 17th. In our situation we are saying the last -- the first time you could file the Complaint was December 27th, so it is only off by 10 days, and it is a very easy calculation to see that we are on

time.

Defendants say that when the Court in Burton said the notice period expires on December 27th, that meant essentially 11:59 p.m. in the evening it expired, so the whole day of December 27th had to pass -- December 17th. I'm sorry. It's June 17th that I'm talking about. They are saying that the whole day had to pass. I would contend that's incorrect because that creates 183 days. I would say that when the Court used the word expired, they meant that as soon as 12:01 a.m. occurred or twelve o'clock and one second occurred that the notice period had expired, so anytime on June 17th of -- in the Burton case, they could have filed their Complaint, otherwise it gives an extra day. But if we have an extra day under defendant's reasoning, we are still not late, even if his, his calculation is that we were, that we were supposed to wait until June 28th, we were still a day early, and MCL 600.2301 protects us from dismissal because it doesn't impact their substantial rights under Decosta and other cases.

THE COURT: Okay. Counsel, I'll give you a short response.

MR. TRUST: Brief reply.

MR. RUCKER: Can I respond to Lancaster?

That is their silver bullet case.

THE COURT: Hang on. Go ahead.

MR. TRUST: Judge, the question that you asked as to, okay, if the notice of intent is served five days before the Statute of Limitations expired is exactly the issue that we have in this case. There are zero days remaining in this Statute of Limitations as to when the NOI was served. It was served on December 26th, 2013. The alleged malpractice occurred December 26th, 2011; 182 plus 0, thankfully going to law school, realizing math, is 182 days, not 183 days.

The other opinions, the prejudice aspect of this is a given, whether the lawsuit is viable or not, I mean, that's a clear prejudice to defendants as to allow the case to go forward. So, Judge, for the reasons that we set forth in the brief and in respect to the additional case law and citations that plaintiff's counsel is citing to today, without the cases directly in front of us, I unfortunately cannot respond to those cases. Those are issues that are outside of the pleadings, so I would just request that we review the case law and that this Honorable Court grant summary disposition pursuant to C(7) and C(8). Thank you, your Honor.

THE COURT: What I am going to do is this: I will give you 10 days to file a response to the cases that he cited. This is a very unique issue, and however I rule somebody is going to take it up. So I am going take the matter under advisement, I am going to issue a written opinion. And if I rule on behalf of the plaintiff, I will grant your Motion for Application to Leave and grant a stay.

MR. TRUST: Thank you, your Honor.

THE COURT: Obviously, if I deny your motion --

MR. TRUST: Similarly do the same.

THE COURT: Yes. Right.

MR. TRUST: Thank you.

MR. RUCKER: Your Honor, Lancaster, I have to deal with that, that was their silver bullet case.

THE COURT: Counsel, number one, I am going to read that case. Number two, I am not bound by it. Because I was --

MR. RUCKER: Correct.

THE COURT: -- certain that you mentioned it in there.

MR. RUCKER: Correct.

THE COURT: I will take it under advisement and then I will issue a written opinion.

Counsel, thank you very much. You did a great job. Thank you.

MR. TRUST: Judge, may we have the citations of the cases that plaintiff cited just --

THE COURT: I can't give you the names but I can give you the cites.

MR. TRUST: Actually I just want to make sure that your instructions today that plaintiff provide us the citations and page numbers of, so forth of the cases cited.

THE COURT: 487 Michigan 116; 300 Michigan Court of Appeals 513; 490 Michigan Supreme 239; and 290 Mich. App. 167.

MR. TRUST: Thank you, your Honor. And plaintiffs have just, so that the record is clear, plaintiffs' counsel has handed me three cases. Thank you.

MR. RUCKER: Your Honor, can I, can I ask the Court to look at Footnote 2 of the Lancaster case?

THE COURT: I will look at the whole case.

MR. RUCKER: Footnote 2 is key. Thank you.

MR. TRUST: Thank you very much, your Honor.

THE COURT: You are welcome.

MR. TRUST: Have a good day.

(Proceedings concluded at 9:20 a.m.)

- - -

CERTIFICATION

STATE OF MICHIGAN)
) *SS*
COUNTY OF MACOMB)

I, Susan L. Hassig, Official Court Reporter of the Sixteenth Judicial Circuit, State of Michigan, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of JEFFREY HAKSLUOTO and CAROL HAKSLUOTO, Plaintiffs, vs. MT. CLEMENS REGIONAL MEDICAL CENTER N/K/A MCLAREN MACOMB GENERAL RADIOLOGY ASSOCIATES, P.C., and ELI SHAPIRO, D.O., Defendants, on Monday, August 11, 2014.

/s/Susan L. Hassig

Susan L. Hassig, CSR-0939
Official Court Reporter

Date: September 26, 2014
Mount Clemens, Michigan

EXHIBIT 3

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▼ 101 West Big Beaver Road ▼ Troy, Michigan 48084-5280 ▼ P: (248) 457-7000 ▼ F: (248) 457-7001 ▼ www.gmhlaw.com

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

JEFFREY HAKSLUOTO
and CAROL HAKSLUOTO,

Plaintiffs,

Case No: 14-2556-NH
Hon. Peter J. Maceroni

-vs-

MT. CLEMENS REGIONAL MEDICAL CENTER,
N/K/A MCLAREN MACOMB,
GENERAL RADIOLOGY ASSOCIATES, P.C.,
and ELI SHAPIRO, D.O.,

Defendants.

STEVE J. WEISS (P32174)
STEVEN P. JENKINS (P59511)
HERTZ SCHRAM PC
Attorneys for Plaintiffs
1760 S. Telegraph Road, Suite 300
Bloomfield Hills, MI 48302-0183
(248) 335-5000 / Fax: (248) 335-3346
sweiss@hertzschram.com

LeROY H. WULFMEIER, III (P22583)
JENNIFER A. ENGELHARDT (P64993)
CHRISTOPHER J. RYAN (P74053)
JARED M. TRUST (P72993)
GIARMARCO, MULLINS & HORTON, P.C.
Attorneys for Defendants
101 W. Big Beaver Rd.
10th Floor Columbia Center
Troy, MI 48084-5280
(248) 457-7000

DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7), (8) AND (10)

NOW COME the Defendants, by and through their attorneys, GIARMARCO, MULLINS & HORTON, P.C., and for their Motion for Summary Disposition Pursuant to MCR 2.116(C)(7), (8) and (10) state as follows:

1. This case involves allegations of medical malpractice relative to care and treatment rendered on December 26, 2011. The statute of limitations is two years, and

would have expired on December 26, 2013. However, on that same date, Plaintiffs sent their Notice of Intent which tolled the statute of limitations for 182 days. Therefore, the statute of limitations expired on June 26, 2014.

2. Plaintiffs filed suit on June 27, 2014, one day *after* the statute of limitations expired.

3. As is fully explained in the accompanying Brief in Support, Plaintiffs failed to timely file their Complaint within the statutory period of limitations, and as such, summary disposition is required pursuant to MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10).

WHEREFORE, Defendants respectfully request that this Honorable Court grant their Motion for Summary Disposition and dismiss this matter with prejudice.

Respectfully submitted,

GIARMARCO, MULLINS & HORTON, P.C.

By:

LeROY H. WULFMEIER, III (P22583)
JENNIFER A. ENGELHARDT (P64993)
CHRISTOPHER J. RYAN (P74053)
JARED M. TRUST (P72993)
Attorneys for Defendants
101 W. Big Beaver Rd., Tenth Floor
Troy, MI 48084-5280
(248) 457-7000

Dated: July 14, 2014

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

BRIEF IN SUPPORT

NOW COME the Defendants, by and through their attorneys, GIARMARCO, MULLINS & HORTON, P.C., in support of their Motion for Summary Disposition Pursuant to MCR 2.116(C)(7), (8) and (10) state as follows:

INTRODUCTION

This case involves allegations of malpractice relative to the interpretation of a radiology report on December 26, 2011. Plaintiffs served their Notice of Intent on December 26, 2013 (**Exhibit A**), which means the statute of limitations expired 182 days later, on June 26, 2014. Plaintiffs did not file their Complaint until June 27, 2014 (**Exhibit B**), after the statute of limitations expired. Dismissal is required.

STATEMENT OF PERTINENT FACTS

For purposes of this motion, the following dates are of significance:

Date	Event
12/26/11	Dr. Shapiro reads Plaintiff Jeffrey Haksluoto's CT scan.
12/26/13	Mr. Haksluoto files an NOI alleging that the 12/26/11 NOI was misread.
6/26/14	182-day tolling period runs and statute of limitations expires.
6/27/14	Plaintiff's Complaint is filed.

Given that the Complaint not timely filed, Defendants now move this Honorable Court for summary disposition.

STANDARD OF REVIEW

Pursuant to MCR 2.116(C)(7), summary disposition is appropriate where the claim is barred by the applicable statute of limitations.

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the Complaint. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). All well pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id*, citing *Wade v Dept of Corrections*, 439 Mich 158, 162, (1992). This motion may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id* at 163. When deciding a motion under MCR 2.116(C)(8), the Court considers only the pleadings. MCR 2.116(G)(5).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden, supra* at 120. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). *See also Maiden, supra* at 120. The moving party has the burden of supporting its position with documentary evidence, and if supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Id* [Emphasis added]. Where the proffered evidence fails to establish a genuine issue regarding any

GMH GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

material fact, the moving party is entitled to judgment as a matter of law. *Id*, MCR 2.116(C)(10), (G)(4).

LAW AND ARGUMENT

I. DISMISSAL WITH PREJUDICE IS REQUIRED BECAUSE PLAINTIFFS FAILED TO TIMELY FILE THEIR COMPLAINT PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS.

The statute of limitations for medical malpractice claims is two years. MCL 600.5805(6). A claimant who wishes to bring a lawsuit sounding in medical malpractice must file a Notice of Intent (NOI) giving Defendants 182-day notice before commencing an action. MCL 600.2912b. The statute of limitations is tolled at the time the Notice of Intent is served. MCL 600.5856(c). However, "The statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." *Id*. Therefore, if a Notice of Intent is filed two years from the date of the alleged malpractice, when the 182-day tolling period ends, it is axiomatic that the statute of limitations will not resume running (*i.e.*, there will be no more days remaining in the applicable notice period after the date notice is given).

Applying the above law to the sentinel events in this case, it is clear that the instant matter is time barred. The claim accrued on the date that the CT was allegedly negligently read, 12/26/11, and therefore the NOI filed exactly two years later, on 12/26/14, was filed with zero days left remaining on the statute of limitations. Plaintiff did not file the Complaint on the statutorily mandated 182nd day (6/26/14), but on the 183rd day (6/27/14). The following table summarizes the sentinel events, as well as their significance, for purposes of this motion:

GMH GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

Date	Event	Significance
12/26/11	Alleged Malpractice	Two year clock begins "ticking" for purposes of statute of limitations.
12/26/13	NOI Filed	Tolls the statute of limitations for 182 days.
6/26/14	*182 day tolling period runs*	*SOL Expires*
6/27/14	Complaint Filed	Dismissal with prejudice

Defendants presume that Plaintiffs will argue that they could not file suit until 6/27/14, and that MCR 1.108 afforded for them to do so. However, the Michigan Court of Appeals addressed the precise issue before this Court, *i.e.*, *when* the tolled statute of limitations expired in the instance of a plaintiff who filed a Notice of Intent on the last day of the period limitations, in the case of *Dewan v Khoury*, Unpublished Opinion Per Curiam of the Court of Appeals, issued March 28, 2006 (Docket No. 265020), leave denied 477 Mich 888 (2006), which is attached as **Exhibit C.** In *Dewan*, the plaintiff served an NOI precisely two years from the date of the date of accrual/loss (alleged malpractice occurred June 4, 2002; NOI filed June 4, 2004). *Id.* Per MCL 600.29121b, the filing of the NOI tolled that statute of limitations for 182 days. *Id.* However, the *Dewan* plaintiff filed suit one business day after the 182-day period ended. *Id.* The trial court granted summary disposition pursuant to MCR 2.116(C)(7), ruling that plaintiff's complaint was barred by the statute of limitations because the complaint was filed the next business day after expiration of the entire 182-day period. *Id.* Plaintiff appealed and the Court of Appeals affirmed the dismissal. *Id.*

The *Dewan* Court reasoned that since plaintiff filed the Notice of Intent two years from the date of the alleged malpractice, when the 182-day tolling period expired, the statute of limitations did not resume running, and plaintiff had no time remaining in which

GMH GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

to file suit. *Id*. The Court further held that no portion of the limitations period remained after the Notice of Intent was expired, because the 182-day tolling period had passed in its entirety. *Id*. The Court stated:

> Moreover, contrary to plaintiff's assertion, the trial court's decision did not shorten the NOI period to 181 days. **Plaintiff chose to wait until the last day of the limitations period in order to serve the NOI. The entire 182-day period elapsed in this case, but plaintiff's act of serving the NOI on the last day of the limitations period ensured that no time would remain in the limitations period when the 182-day period expired.**
> *Id (Emphasis Added)*.

The current case is identical in every material respect to *Dewan*. Here, Plaintiff's allegations of negligence against Defendants relate to actions taken on December 26, 2011. As did the plaintiff in *Dewan*, the instant Plaintiffs waited until the last possible day (December 26, 2013) to serve their Notice of Intent. The Notice of Intent tolled the statute of limitations for 182 days. As such, the statute of limitations expired on June 26, 2014. Like *Dewan*, after the 182 day tolling period expired, Plaintiffs had zero additional days remaining to file the Complaint within the two-year statute of limitations period. In order to file timely, Plaintiffs needed to file their Complaint on June 26, 2014. They did not. Instead, they filed on June 27, 2014. Therefore, Plaintiffs failed to file their Complaint within the statute of limitations. Defendants are entitled to dismissal with prejudice.

CONCLUSION AND REQUEST FOR RELIEF

By choosing to serve their Notice of Intent on the last possible day, Plaintiffs put themselves in a position where they had to file their Complaint on June 26, 2014. They failed to do so, and as a result of their decision, summary disposition is required.

WHEREFORE, Defendants respectfully request that this Honorable Court grant their Motion for Summary Disposition and dismiss this matter with prejudice.

Respectfully submitted,

GIARMARCO, MULLINS & HORTON, P.C.

By:

LeROY H. WULFMEIER, III (P22583)
JENNIFER A. ENGELHARDT (P64993)
CHRISTOPHER J. RYAN (P74053)
JARED M. TRUST (P72993)
Attorneys for Defendants
101 W. Big Beaver Rd., Tenth Floor
Troy, MI 48084-5280
(248) 457-7000

Dated: July 14, 2014

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by mailing the same to them at their respective business addresses disclosed by the pleadings of record herein with postage fully pre-paid thereon on July 14, 2014.

LINDA S. ALLEN
Legal Assistant

GMH GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

EXHIBIT A

BRADLEY J. SCHRAM 1
HOWARD HERTZ
VICTOR M. NORRIS
ROBERT P. GELLER
STEVE J. WEISS 2
WALTER J. PISZCZATOWSKI
JEFFREY A. ROBBINS 2, 4
KENNETH F. SILVER
RICHARD H. SCHLOSS
MICHAEL J. REX
EVA T. CANTARELLA
LISA M. KAVALHUNA 3
STEVEN P. JENKINS
GERALD P. CAVELLIER
PATRICIA A. STAMLER
JAY O. ZASSO
ALEXANDER STOYLAND 8
LISA D. STERN
LAURIE S. RAAB
DEBORAH S. LAPIN 6
ELIZABETH C. THOMSON
DANIEL W. RUCKER
DIANA G. BROWN
JONATHAN D. SWEIK
STEVEN M. NOFAR 7
MATTHEW B. WALKER
JOSEPH A. BELLANCA
MATTHEW J. TURCHYN

LAW OFFICES
HERTZ SCHRAM PC
1760 SOUTH TELEGRAPH ROAD
SUITE 300
BLOOMFIELD HILLS, MICHIGAN 48302-0183

TELEPHONE (248) 335-5000
FACSIMILE (248) 335-3346

www.hertzschram.com

COUNSEL
JAMES W. BURDICK, IV 5

OF COUNSEL
ELMER L. ROLLER, P.C.

HARVEY D. GELLER
(1928-1989)

JUSTIN C. RAVITZ
(1940-2007)

1 ALSO MEMBER OF FLORIDA AND WASHINGTON, D.C. BARS
2 ALSO MEMBER OF FLORIDA BAR
3 ALSO MEMBER OF OHIO BAR
4 ALSO C.P.A. AND LL.M. IN TAXATION
5 ALSO MEMBER OF CALIFORNIA BAR
6 ALSO MEMBER OF NEW YORK & CONNECTICUT BARS
7 ALSO C.P.A.
8 ALSO MEMBER OF NEW YORK BAR

December 26, 2013

Office of the CEO
MCRMC

DEC 30 2013

Received

2912b NOTICE OF INTENT TO FILE CLAIM

THIS NOTICE IS INTENDED TO APPLY TO THE HEALTH CARE PROFESSIONALS, ENTITIES, AND/OR FACILITIES AS WELL AS THEIR EMPLOYEES OR AGENTS, ACTUAL OR OSTENSIBLE, WHO WERE INVOLVED IN THE TREATMENT OF JEFFREY HAKSLUOTO.

Joseph Flynn, DO
1000 Harrington Street
Mt. Clemens, Michigan 48043

Mt. Clemens Emergency Physicians PLLC
Resident Agent: Rich Reidy
1000 Harrington Street
Mt. Clemens, Michigan 48043

Eli E. Shapiro, DO
1000 Harrington St
Mount Clemens, MI 48043

Apram Basra, DO
1000 Harrington St
Mount Clemens, MI 48043

General Radiology Assoc., PC
Resident Agent: Eli Shapiro
1836 Oak
Birmingham, Michigan 48009

Mount Clemens Regional Medical Center
Resident Agent: Mark S. O'Halla
1000 Harrington Blvd.
Mount Clemens, MI 48043

1) FACTUAL BASIS FOR CLAIM:

This is a claim for medical malpractice being brought on behalf of Jeffrey Haksluoto ("Mr. Haksluoto") alleging negligence as a result of the circumstances surrounding the treatment provided by Mount Clemens Regional Medical Center ("Mt. Clemens") and its employees and agents, including but not limited to Joseph Flynn, DO ("Dr. Flynn"), and Mt. Clemens Emergency Physicians PLLC (Emergency Physicians"), Apram Basra, D.O. ("Dr. Basra"), Eli E. Shapiro, DO ("Dr. Shapiro") and General Radiology Assoc., PC ("General Radiology") for their failure to properly and timely diagnose and treat Mr. Haksluoto on or about December 26, 2011.

Mr. Haksluoto, age 51, presented to Mt. Clemens on December 26, 2011 with complaints of abdominal pain, nausea, vomiting and diarrhea. His abdomen was tender and tight and with constant mid-epigastric pain, (listed as "5 out of 10"), which worsened while sitting and felt better when lying down on his right side. Mr. Haksluoto also provided a recent history of vomiting 2-3 times for the past three days. According to the Mt. Clemens record, Mr. Haksluoto was seen by Dr. Flynn and Dr. Basra. Upon examination, Mr. Haksluoto's abdominal was distended with decreased bowel sounds. An abdominal x-ray was performed and the impression was, "*dilated air filled loops of small and large bowel with some air fluid leveling may related to an ileus. Obstruction cannot be entirely excluded. No gross free air is seen. No active pulmonary disease.*" However, a CT scan without contrast was later performed and read by Dr. Shapiro as "unremarkable appearing CT examination of the abdomen and pelvis. There is a small calcification within the distal aspect of the appendix; however, the appendix appears otherwise unremarkable." Mr. Haksluoto was discharged with pain medication. The final diagnosis was acute gastritis, acute vomiting, acute diarrhea, severe abdominal pain, acute ileus.

Despite the CT scan findings, Mr. Haksluoto is critical of the decision to discharge him given the findings on the abdominal x-rays, the abnormal laboratory results, and his clinical picture suggestive of an obstruction or an acute unidentified abdominal process Moreover, Mr. Haksluoto is critical of the reading of the CT scan, as the CT scan was not normal and a colonoscopy should have been recommended.

On January 6, 2012, Mr. Haksluoto returned to Mt. Clemens with complaints of severe abdominal pain which was sharp and stabbing in nature along with emesis. Mr. Haksluoto provided a history of recently being seen in the hospital after vomiting up "black bile." An abdominal series was performed at the time, which revealed "*a large amount of free intraperitoneal air. Residual oral contrast is seen in the small bowel and colon from the prior upper GI. Impression: Free intraperitoneal air.*" Mr. Haskluoto was taken emergently taken to the operating room for surgical intervention.

The post-operative diagnosis was perforated abdominal viscus, status post subtotal colectomy secondary to perforation, colon obstruction with ischemia and sepsis and anastomotic breakdown of small bowel anastomosis with free perforation into the abdomen. Thereafter, Mr. Haksluoto suffered multiple hospitalizations and complications including respiratory and kidney failure, the need for multiple surgical interventions and hospitalizations, rehabilitation and hemodialysis. He is no longer able to work given his ongoing deficits.

As a result of the failure to properly and timely diagnose Mr. Haksluoto's acute complaints on December 26, he suffered delayed diagnosis of an acute abdominal process and or obstruction, perforated abdominal viscus, ischemic injury, including areas of mucolsal ulceration and necrosis, trasmural necrosis, inflammation, thrombosis, myocardial infarction, pulmonary complications, peritonitis, the abscesses, necrosis, small bowel anastomosis, septic shock, kidney failure with acute tubular necrosis secondary to septic shock requiring hemodialysis, respiratory failure, infections, the need for a colostomy, wound vacs, and gastrostomy tube, approximately thirteen surgeries, including but not limited to a colostomy, multiple exploratory laparotomy and omentectomy, irrigation and wound debridement of the abdominal wall, a total abdominal reconstruction, and abdominalplasty surgery. Moreover, Mr. Haksluoto suffers increased risk of future complications, physical, emotional and financial hardship, wage loss, significant medical expenses, severe pain and discomfort, anxiety, embarrassment, mental anguish, fright, shock, anxiety, emotional distress and other related damages.

At all times pertinent hereto, Dr. Flynn, and any all physicians who diagnosed, evaluated and or examined Mr. Haksluoto were employees and/or agents of Emergency Physicians and Mt. Clemens and thereby imposing vicarious liability on Emergency Physicians and Mt. Clemens for the actions of said health care providers.

At all times pertinent hereto, Dr. Shapiro and any all physicians who diagnosed, evaluated and or examined Mr. Haksluoto were employees and/or agents of and Mt. Clemens and General Radiology thereby imposing vicarious liability on General Radiology and Mt. Clemens for the actions of said health care providers.

At all times pertinent hereto, Dr. Basra and any all physicians who diagnosed, evaluated and or examined Mr. Haksluoto were employees and/or agents of and Mt. Clemens thereby imposing vicarious liability on Mt. Clemens for the actions of said health care provider.

2) THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED

The standard of care required that Dr. Flynn, and Dr. Basra along with any and all of employees, agents, staff, or medical personnel involved in the care of Mr. Haksluoto accomplish the following:

Treat Mr. Haksluoto in accordance with the standard of care for caregivers and physicians engaged in the practice of emergency medicine;

Properly implement a plan to appropriately manage, monitor and treat Mr. Haksluoto when he presented to Mt. Clemens;

Properly monitor, supervise and treat Mr. Haksluoto to avoid causing undue harm and injury;

Timely and without delay identify, recognize and treat the signs and symptoms of acute abdominal process and or obstruction;

Timely and without delay identify, recognize and treat the signs and symptoms of a bowel obstruction and or acute abdominal process so as to prevent a perforation and a fatal deterioration of Mr. Haksluoto's medical condition;

Order a gastroenterology consult;

Order a colonoscopy;

Order bowel rest;

Admit Mr. Haksluoto to the hospital for careful monitoring and surgical intervention;

Properly discontinue oral feedings;

Perform a colonoscopy;

Order repeat x-rays, ultrasounds, and CT scans to effectively monitor Mr. Haksluoto's abdomen and to avoid complications;

Recognize the need for urgent intervention to determine the etiology of and stem the tide of Mr. Haksluoto's deteriorating medical condition;

Order a CT scan with IV contrast;

Properly consider and timely order exploratory surgery and or decompressive colonoscopy;

Refrain from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Other areas of malpractice to be discovered.

The standard of care required that Dr. Shapiro, MD along with any and all of employees, agents, staff, or medical personnel involved in the care of Mr. Haksluoto accomplish the following:

Treat Mr. Haksluoto in accordance with the standard of care for caregivers and physicians engaged in the practice of radiology;

Timely and without delay identify, recognize and report signs and symptoms of colon thickening, an acute abdominal process and or obstruction;

Recommend a colonoscopy;

Recommend repeat x-rays, and CT scans (with and without contrast) to effectively monitor and diagnose Mr. Haksluoto's abdomen;

Refrain from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Properly read and report any and all abnormalities on the CT scan dated December 26;

Other areas of malpractice to be discovered.

The standard of care required that Mt. Clemens, General Radiology and Emergency Physicians any and all of its employees, agents, staff and medical personnel involved in Mr. Haksluoto's care accomplish the following:

Draft, distribute, implement and/or enforce appropriate rules, regulations, policies, procedures, orders and provisions which could and should have prevented the acts of negligence committed and should have prevented the injuries which were suffered;

Provide physicians, technical and support personnel, as well as the technical diagnostic and treatment services, with equipment and training necessary to ensure the safe performance of the health care undertaken;

Properly ensure all of its employees, including but not limited to, physicians, technical and support personnel, are trained to emergently evaluate, detect, diagnose and treat bowel obstructions;

Draft, disseminate, adopt, implement, and/or enforce appropriate rules, regulations, policies, procedures, and orders which would and should have resulted in the appropriate and timely treatment of Mr. Haksluoto;

Judiciously train its staff concerning effective diagnosis and intervention of an obstruction and or acute abdominal process to ensure proper medical evaluation and treatment;

Treat Mr. Haksluoto in accordance with the standard of care for caregivers and physicians engaged in the practice of emergency medicine and radiology;

Properly implement a plan to appropriately manage, monitor and treat Mr. Haksluoto when he presented to Mt. Clemens;

Properly monitor, supervise and treat Mr. Haksluoto to avoid causing undue harm and injury;

Timely and without delay identify, recognize and treat the signs and symptoms of acute abdominal process and or obstruction;

Timely and without delay identify, recognize and treat the signs and symptoms of a bowel obstruction and or acute abdominal process so as to prevent a perforation and a fatal deterioration of Mr. Haksluoto's medical condition;

Order a gastroenterology consult;

Order a colonoscopy;

Order bowel rest;

Admit Mr. Haksluoto to the hospital for careful monitoring and surgical intervention;

Properly discontinue oral feedings;

Perform a colonoscopy;

Order repeat x-rays, ultrasounds, and CT scans to effectively monitor Mr. Haksluoto's abdomen and to avoid complications;

Recognize the need for urgent intervention to determine the etiology of and stem the tide of Mr. Haksluoto's deteriorating medical condition;

Order a CT scan with IV contrast;

Properly consider and timely order exploratory surgery and or decompressive colonoscopy;

Refrain from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Timely and without delay identify, recognize and report signs and symptoms of colon thickening, an acute abdominal process and or obstruction;

Recommend a colonoscopy;

Recommend repeat x-rays, and CT scans (with and without contrast) to effectively monitor and diagnose Mr. Haksluoto's abdomen;

Properly read and report any and all abnormalities on the CT scan dated December 26;

Other areas of malpractice to be discovered.

3) **The standard of care was breached in that Drs. Flynn, and Basra and any and all of the employees, agents, staff and medical personnel involved in Mr. Haksluoto's care failed to accomplish the following:**

Failed to treat Mr. Haksluoto in accordance with the standard of care for caregivers and physicians engaged in the practice of emergency medicine;

Failed to properly implement a plan to appropriately manage, monitor and treat Mr. Haksluoto when he presented to Mt. Clemens;

Failed to properly monitor, supervise and treat Mr. Haksluoto to avoid causing undue harm and injury;

Failed to timely and without delay identify, recognize and treat the signs and symptoms of acute abdominal process and or obstruction;

Failed to timely and without delay identify, recognize and treat the signs and symptoms of a bowel obstruction and or acute abdominal process so as to prevent a perforation and a fatal deterioration of Mr. Haksluoto's medical condition;

Failed to order a gastroenterology consult;

Failed to order a colonoscopy;

Failed to order bowel rest;

Failed to admit Mr. Haksluoto to the hospital for careful monitoring and surgical intervention;

Failed to properly discontinue oral feedings;

Failed to perform a colonoscopy;

Failed to order repeat x-rays, ultrasounds, and CT scans to effectively monitor Mr. Haksluoto's abdomen and to avoid complications;

Failed to recognize the need for urgent intervention to determine the etiology of and stem the tide of Mr. Haksluoto's deteriorating medical condition;

Failed to order a CT scan with IV contrast;

Failed to properly consider and timely order exploratory surgery and or decompressive colonoscopy;

Failed to refrain from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Other areas of malpractice to be discovered.

The standard of care was breached in that Dr. Shapiro and any and all of the employees, agents, staff and medical personnel involved in Mr. Haksluoto's care failed to accomplish the following:

Failed to treat Mr. Haksluoto in accordance with the standard of care for caregivers and physicians engaged in the practice of radiology;

Failed to timely and without delay identify, recognize and report signs and symptoms of colon thickening, an acute abdominal process and or obstruction;

Failed to recommend a colonoscopy;

Failed to recommend repeat x-rays, and CT scans (with and without contrast) to effectively monitor and diagnose Mr. Haksluoto's abdomen;

Failed to refrain from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Failed to properly read and report any and all abnormalities on the CT scan dated December 26;

Other areas of malpractice to be discovered.

The standard of care was breached in that Mt. Clemens, General Radiology and Emergency Physicians and any and all its employees, agents, staff and medical personnel involved in Mr. Haksluoto's care failed to accomplish the following:

Failed to draft, distribute, implement and/or enforce appropriate rules, regulations, policies, procedures, orders and provisions which could and should have prevented the acts of negligence committed and should have prevented the injuries which were suffered;

Failed to provide physicians, technical and support personnel, as well as the technical diagnostic and treatment services, with equipment and training necessary to ensure the safe performance of the health care undertaken;

Failed to properly ensure all of its employees, including but not limited to, physicians, technical and support personnel, are trained to emergently evaluate, detect, diagnose and treat an acute abdominal process and or obstruction;

Failed to draft, disseminate, adopt, implement, and/or enforce appropriate rules, regulations, policies, procedures,, and orders which would and should have resulted in the appropriate and timely treatment of Mr. Haksluoto;

Failed to judiciously train its staff concerning effective diagnosis and intervention of an acute abdominal process and or obstruction to ensure proper medical evaluation and treatment;

Failed to treat Mr. Haksluoto in accordance with the standard of care for caregivers and physicians engaged in the practice of emergency medicine;

Failed to properly implement a plan to appropriately manage, monitor and treat Mr. Haksluoto when he presented to Mt. Clemens;

Failed to properly monitor, supervise and treat Mr. Haksluoto to avoid causing undue harm and injury;

Failed to timely and without delay identify, recognize and treat the signs and symptoms of acute abdominal process and or obstruction;

Failed to timely and without delay identify, recognize and treat the signs and symptoms of a bowel obstruction and or acute abdominal process so as to prevent a perforation and a fatal deterioration of Mr. Haksluoto's medical condition;

Failed to order a gastroenterology consult;

Failed to order a colonoscopy;

Failed to order bowel rest;

Failed to admit Mr. Haksluoto to the hospital for careful monitoring and surgical intervention;

Failed to properly discontinue oral feedings;

Failed to perform a colonoscopy;

Failed to order repeat x-rays, ultrasounds, and CT scans to effectively monitor Mr. Haksluoto's abdomen and to avoid complications;

Failed to recognize the need for urgent intervention to determine the etiology of and stem the tide of Mr. Haksluoto's deteriorating medical condition;

Failed to order a CT scan with IV contrast;

Failed to properly consider and timely order exploratory surgery and or decompressive colonoscopy;

Failed to refrain from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Failed to timely and without delay identify, recognize and report signs and symptoms of colon thickening, an acute abdominal process and or obstruction;

Failed to recommend a colonoscopy;

Failed to recommend repeat x-rays, and CT scans (with and without contrast) to effectively monitor and diagnose Mr. Haksluoto's abdomen;

Failed to recommend a colonoscopy;

Failed to properly read and report any and all abnormalities on the CT scan dated December 26;

Other areas of malpractice to be discovered.

4) The standard of care required that Dr. Flynn, and Dr. Basra and any and all employees, agents, staff, or medical personnel involved in the care of Mr. Haksluoto should have accomplished the following:

Should have treated Mr. Haksluoto in accordance with the standard of care for caregivers and physicians engaged in the practice of emergency medicine;

Should have properly implemented a plan to appropriately manage, monitor and treat Mr. Haksluoto when he presented to Mt. Clemens;

Should have properly monitored, supervised and treated Mr. Haksluoto to avoid causing undue harm and injury;

Should have timely and without delay identified, recognized and treated the signs and symptoms of acute abdominal process and or obstruction;

Should have timely and without delay identified, recognized and treated the signs and symptoms of a bowel obstruction and or acute abdominal process so as to prevent a perforation and a fatal deterioration of Mr. Haksluoto's medical condition;

Should have ordered a gastroenterology consult;

Should have ordered a colonoscopy;

Should have ordered bowel rest;

Should have admitted Mr. Haksluoto to the hospital for careful monitoring and surgical intervention;

Should have properly discontinued oral feedings;

Should have performed a colonoscopy;

Should have ordered repeat x-rays, ultrasounds, and CT scans to effectively monitor Mr. Haksluoto's abdomen and to avoid complications;

Should have recognized the need for urgent intervention to determine the etiology of and stem the tide of Mr. Haksluoto's deteriorating medical condition;

Should have ordered a CT scan with IV contrast;

Should have properly considered and timely ordered exploratory surgery and or decompressive colonoscopy;

Should have refrained from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Other areas of malpractice to be discovered.

The standard of care required that Dr. Shapiro and any and all of its employees, agents, staff and medical personnel involved in Mr. Haksluoto's care should have accomplished the following:

Should have treated Mr. Haksluoto in accordance with the standard of care for caregivers and physicians engaged in the practice of radiology;

Should have timely and without delay identify, recognize and report signs and symptoms of colon thickening, an acute abdominal process and or obstruction;

Should have recommended a colonoscopy;

Should have recommended repeat x-rays, and CT scans (with and without contrast) to effectively monitor and diagnose Mr. Haksluoto's abdomen;

Should have refrained from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Should have properly read and reported any and all abnormalities on the CT scan dated December 26;

Other areas of malpractice to be discovered.

The standard of care required that Mt. Clemens, General Radiology and Emergency Physicians and any and all of its employees, agents, staff and medical personnel involved in Mr. Haksluoto's care should have accomplished the following:

Should have drafted, distributed, implemented and/or enforced appropriate rules, regulations, policies, procedures, orders and provisions which could and should

have prevented the acts of negligence committed and should have prevented the injuries which were suffered;

Should have provided physicians, technical and support personnel, as well as the technical diagnostic and treatment services, with equipment and training necessary to ensure the safe performance of the health care undertaken;

Should have properly ensured all of its employees, including but not limited to, physicians, technical and support personnel, are trained to emergently evaluate, detect, diagnose and treat an acute abdominal process and or obstruction;

Should have drafted, disseminated, adopted, implemented, and/or enforced appropriate rules, regulations, policies, procedures, and orders which would and should have resulted in the appropriate and timely treatment of Mr. Haksluoto;

Should have judiciously trained its staff concerning effective diagnosis and intervention of an acute abdominal process and or obstruction to ensure proper medical evaluation and treatment;

Should have treated Mr. Haksluoto in accordance with the standard of care for caregivers and physicians engaged in the practice of emergency and radiology medicine;

Should have properly implemented a plan to appropriately manage, monitor and treat Mr. Haksluoto when he presented to Mt. Clemens;

Should have properly monitored, supervised and treated Mr. Haksluoto to avoid causing undue harm and injury;

Should have timely and without delay identified, recognized and treated the signs and symptoms of acute abdominal process and or obstruction;

Should have timely and without delay identified, recognized and treated the signs and symptoms of a bowel obstruction and or acute abdominal process so as to prevent a perforation and a fatal deterioration of Mr. Haksluoto's medical condition;

Should have ordered a gastroenterology consult;

Should have ordered a colonoscopy;

Should have ordered bowel rest;

Should have admitted Mr. Haksluoto to the hospital for careful monitoring and surgical intervention;

Should have properly discontinued oral feedings;

Should have performed a colonoscopy;

Should have ordered repeat x-rays, ultrasounds, and CT scans to effectively monitor Mr. Haksluoto's abdomen and to avoid complications;

Should have recognized the need for urgent intervention to determine the etiology of and stem the tide of Mr. Haksluoto's deteriorating medical condition;

Should have ordered a CT scan with IV contrast;

Should have properly considered and timely ordered exploratory surgery and or decompressive colonoscopy;

Should have refrained from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Should have timely and without delay identify, recognize and report signs and symptoms of colon thickening, an acute abdominal process and or obstruction;

Should have recommended a colonoscopy;

Should have recommended repeat x-rays, and CT scans (with and without contrast) to effectively monitor and diagnose Mr. Haksluoto's abdomen;

Should have refrained from causing and/or contributing to the deterioration in Mr. Haksluoto's condition;

Should have properly read and reported any and all abnormalities on the CT scan dated December 26;

Other areas of malpractice to be discovered.

5) THE MANNER IN WHICH THE BREACHES WERE THE PROXIMATE CAUSE OF THE CLAIMED INJURY.

As a result of the breaches in the standard of care on the part of those health care providers identified above, Mr. Haksluoto was caused to suffer a failed to diagnosis and treatment of a acute abdominal process and or obstruction resulting in delayed treatment.

As a result of Dr. Flynn's, Dr. Basra's, Dr. Shapiro's, Mt. Clemen's, General Radiology's and Emergency Physician's, including any and all of their employees, medical personnel, staff and agents', failure to comply with the applicable standard of care, as outlined above and, more specifically, their failure to: Properly implement a plan to appropriately manage, monitor and treat Mr. Haksluoto when he presented to Mt. Clemens; Properly monitor, supervise and treat Mr. Haksluoto to avoid causing undue harm and injury; Timely and without delay identify, recognize and treat the signs and symptoms of acute abdominal process and or obstruction; Timely and without delay identify, recognize and treat the signs and symptoms of a bowel obstruction and or acute abdominal process so as to prevent a perforation and a fatal deterioration of Mr. Haksluoto's medical condition; Order a gastroenterology consult; Order a colonoscopy; Order bowel rest; Admit Mr. Haksluoto to the hospital for careful monitoring and surgical intervention; Properly discontinue oral feedings; Perform a colonoscopy; Order repeat x-rays, ultrasounds, and CT scans to effectively monitor Mr. Haksluoto's abdomen and to avoid complications; Recognize the need for urgent intervention to determine the etiology of and stem the tide of Mr. Haksluoto's deteriorating medical condition; Order a CT scan with IV contrast; Properly consider and timely order exploratory surgery and or decompressive colonoscopy; Refrain from causing and/or contributing to the deterioration in Mr. Haksluoto's condition; Timely and without delay identify, recognize and report signs and symptoms of colon thickening, an acute abdominal process and or obstruction; Recommend a colonoscopy; Recommend repeat x-rays, and CT scans (with and without contrast) to effectively monitor and diagnose Mr. Haksluoto's abdomen; Properly read and report any and all abnormalities on the CT scan dated December 26, Mr. Haksluoto suffered a failed diagnosis and delayed treatment of an acute abdominal process and or obstruction, perforated abdominal viscus, ischemic injury, including areas of mucolsal ulceration and necrosis, trasmural necrosis, inflammation, thrombosis, myocardial infarction, pulmonary complications, peritonitis, the abscesses, necrosis, small bowel anastomosis, septic shock, kidney failure with acute tubular necrosis secondary to septic shock requiring hemodialysis, respiratory failure, infections, the need for a colostomy, wound vacs, and gastrostomy tube, approximately thirteen surgeries, including but not limited to a colostomy, multiple exploratory laparotomy and omentectomy, irrigation and wound debridement of the abdominal wall, a total abdominal reconstruction, and abdominalplasty surgery. Moreover, Mr. Haksluoto suffers increased risk of future complications, physical, emotional and financial hardship, wage loss, significant medical expenses, severe pain and discomfort, anxiety, embarrassment, mental anguish, fright, shock, anxiety, emotional distress and other related damages.

Had it not been for Dr. Flynn's, Dr. Basra's, Dr. Shapiro's, Mt. Clemen's, General Radiology's and Emergency Physician's including any and all of their employees, medical

personnel, staff and agents' failure to comply with the applicable standard of care as outlined above and, more specifically, their failure to: Properly implement a plan to appropriately manage, monitor and treat Mr. Haksluoto when he presented to Mt. Clemens; Properly monitor, supervise and treat Mr. Haksluoto to avoid causing undue harm and injury; Timely and without delay identify, recognize and treat the signs and symptoms of acute abdominal process and or obstruction; Timely and without delay identify, recognize and treat the signs and symptoms of a bowel obstruction and or acute abdominal process so as to prevent a perforation and a fatal deterioration of Mr. Haksluoto's medical condition; Order a gastroenterology consult; Order a colonoscopy; Order bowel rest; Admit Mr. Haksluoto to the hospital for careful monitoring and surgical intervention; Properly discontinue oral feedings; Perform a colonoscopy; Order repeat x-rays, ultrasounds, and CT scans to effectively monitor Mr. Haksluoto's abdomen and to avoid complications; Recognize the need for urgent intervention to determine the etiology of and stem the tide of Mr. Haksluoto's deteriorating medical condition; Order a CT scan with IV contrast; Properly consider and timely order exploratory surgery and or decompressive colonoscopy: Refrain from causing and/or contributing to the deterioration in Mr. Haksluoto's condition; Timely and without delay identify, recognize and report signs and symptoms of colon thickening, an acute abdominal process and or obstruction; Recommend a colonoscopy; Recommend repeat x-rays, and CT scans (with and without contrast) to effectively monitor and diagnose Mr. Haksluoto's abdomen; Properly read and report any and all abnormalities on the CT scan dated December 26, Mr. Haksluoto would most likely not have suffered a failed diagnosis and delayed treatment of an acute abdominal process and or obstruction, perforated abdominal viscus, ischemic injury, including areas of mucolsal ulceration and necrosis, trasmural necrosis, inflammation, thrombosis, myocardial infarction, pulmonary complications, peritonitis, the abscesses, necrosis, small bowel anastomosis, septic shock, kidney failure with acute tubular necrosis secondary to septic shock requiring hemodialysis, respiratory failure, infections, the need for a colostomy, wound vacs, and gastrostomy tube, approximately thirteen surgeries, including but not limited to a colostomy, multiple exploratory laparotomy and omentectomy, irrigation and wound debridement of the abdominal wall, a total abdominal reconstruction, and abdominalplasty surgery. Moreover, Mr. Haksluoto suffers increased risk of future complications, physical, emotional and financial hardship, wage loss, significant medical expenses, severe pain and discomfort, anxiety, embarrassment, mental anguish, fright, shock, anxiety, emotional distress and other related damages.

Further, as an additional result of the mismanagement of Mr. Haksluoto's care and treatment, as outlined above, Mr. Haksluoto's family was caused to witness the infliction of tortuous injuries upon her resulting in emotional and mental damages.

The above allegations are based upon information contained in Claimant's medical records which are currently possessed by Plaintiff's counsel. Claimant reserves the right to modify and/or make additional allegation(s) after discovery has been initiated and further analysis is conducted by expert witnesses.

6) NAMES OF HEALTH PROFESSIONALS, ENTITIES AND FACILITIES NOTIFIED:

Dr. Flynn, Dr. Basra, Dr. Shapiro, Mt. Clemens, General Radiology and Emergency Physicians along with any and all of their employees, agents, staff and medical personnel involved in the care and treatment of Mr. Haksluoto.

7) MEDICAL RECORDS AND UNIDENTIFIED HEALTH CARE PROFESSIONALS:

In connection with the processing of this Notice of Intent to File Claim, the health care providers stated herein are asked to provide certified copies of any and all medical records in their possession regarding the treatment provided to Mr. Haksluoto and asked to identify any and all health care providers who provided treatment to her.

8) NOTICE OF ACCESS TO MEDICAL RECORDS IN CLAIMANT'S POSSESSION:

Claimant hereby places all of the above listed health care providers, their employees, and/or agents listed in this Notice of Intent on notice of their opportunity to gain access to, to inspect and a copy of Claimant's medical records. Arrangements for such access should be directed in writing to attorney, Steve J. Weiss, Esq., at the contact information provided below.

TO THOSE RECEIVING NOTICE: YOU SHOULD FURNISH THIS NOTICE TO ANY PERSON, ENTITY OR FACILITY, NOT SPECIFICALLY NAMED HEREIN THAT YOU REASONABLY BELIEVE MIGHT BE ENCOMPASSED IN THIS CLAIM.

Hertz, Schram PC

Steve J. Weiss

Steve J. Weiss, Esq.
Hertz Schram PC
1760 S. Telegraph Rd., Ste. 300
Bloomfield Hills, MI 48302-0183
(248) 335-5000 ext. 251

Dated: December 26, 2013

After being duly sworn, the undersigned deposes and states that on December 26, 2013, she served Dr. Flynn, Dr. Basra, Dr. Shapiro, Mt. Clemens, General Radiology and Emergency Physicians at their last known addresses, Claimant's Notice of Intent by placing said document in properly addressed envelopes with certified/return receipt first

class postage duly affixed and having same deposited in a U.S. mail receptacle located in the City of Bloomfield Hills.

Cindy Woodard

EXHIBIT B

STATE OF MICHIGAN

IN THE 16th CIRCUIT COURT FOR THE COUNTY OF MACOMB

JEFFREY HAKSLUOTO
and CAROL HAKSLUOTO,

Plaintiffs,

v

MT. CLEMENS REGIONAL MEDICAL CENTER, a Domestic Non-Profit Corporation, GENERAL RADIOLOGY ASSOC., P.C., a Domestic Professional Service Corporation, and ELI SHAPIRO, D.O.,

Defendants.

14-2556-NH

Case No. 14- -NH
Hon.

PETER J. MACERONI

HERTZ SCHRAM PC
By: Steve J. Weiss (P32174)
Steven P. Jenkins (P59511)
Attorneys for Plaintiffs
1760 S. Telegraph Road, Suite 300
Bloomfield Hills, MI 48302-0183
(248) 335-5000 / Fax: (248) 335-3346
sweiss@hertzschram.com

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this complaint pending in this court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge, nor do I know of any other civil action, between these parties, arising out of the same transaction or occurrence as alleged in this complaint that is either pending or was previously filed and dismissed, transferred, or otherwise disposed of after having been assigned to a judge in this court.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs, JEFFREY HAKSLUOTO ("Mr. Haksluoto"), and CAROL HAKSLUOTO ("Mrs. Haksluoto"), by and through their attorneys, Hertz Schram PC, for their Complaint against Defendants, MT. CLEMENS REGIONAL MEDICAL CENTER, a Domestic Non-Profit

Corporation, GENERAL RADIOLOGY ASSOC., P.C., a Domestic Professional Service Corporation, and ELI SHAPIRO, D.O., states:

Jurisdiction and Venue

1. This is a medical malpractice case. Pursuant to MCL 600.2912d, attached hereto as **Exhibit 1** are the Affidavits of Merit signed by Seth Glick, M.D., who is board certified in radiology and Fred Simon, MD, who is board certified in general surgery. According to the Affidavits of Merit, Dr. Glick and Dr. Simons have reviewed Mr. Haksluoto's pertinent medical records and are of the opinion that the medical malpractice claims brought by Mr. Haksluoto are meritorious.

2. Pursuant to MCL 600.2912b, Defendants were provided with the required Notice of Intent on December 26, 2011.

3. Mr. Haksluoto and Mrs. Haksluoto are residents of the City of St. Clair Shores, Macomb County, Michigan.

4. Mount Clemens Regional Medical Center ("Mt. Clemens") is a Domestic Non-Profit Corporation doing business in the City of Mount Clemens, Macomb County, Michigan.

5. General Radiology Assoc., PC, ("General Radiology") is a Domestic Professional Service Corporation doing business in the City of Birmingham, Oakland County, Michigan.

6. Dr. Shapiro is a physician licensed to practice medicine in the State of Michigan and at all pertinent times provided health care services in the City of Mount Clemens, Macomb County, Michigan.

7. The amount in controversy exceeds Twenty-Five Thousand Dollars ($25,000), exclusive of interest and costs.

General Allegations

8. Plaintiffs re-allege and incorporate by reference Paragraphs 1 through 7 as though more fully set forth herein.

9. At all times pertinent hereto, Mount Clemens, General Radiology and Dr. Shapiro, along with their agents, employees, staff and medical personnel involved in the care of Mr. Haksluoto, held themselves out to the public and to Mr. Haksluoto as qualified medical treaters, possessing the requisite abilities and training to properly diagnose and treat Mr. Haksluoto.

10. Mt. Clemens is vicariously liable for the acts and/or omissions of Dr. Shapiro because he was an ostensible and/or actual agent of Mt. Clemens.

11. General Radiology is vicariously liable for the acts and/or omissions of Dr. Shapiro because he was an ostensible and/or actual agent of General Radiology.

12. Mr. Haksluoto presented to Mt. Clemens on December 26, 2011 with complaints of abdominal pain, nausea, vomiting and diarrhea. Mr. Haksluoto's abdomen was tender and tight and with constant mid-epigastric pain, (listed as "5 out of 10"), which worsened while sitting and felt better when lying down on his right side. Mr. Haksluoto also provided a recent history of vomiting 2-3 times for the past three days.

13. According to the Mt. Clemens record, Mr. Haksluoto was evaluated by two Mt. Clemens emergency medicine physicians. Upon examination, Mr. Haksluoto's abdominal was distended with decreased bowel sounds.

14. Given Mr. Haksluoto's complaints, an abdominal x-ray was requested and performed. The impression was reported as, "*dilated air filled loops of small and large bowel with some air fluid leveling may related to an ileus. Obstruction cannot be entirely excluded. No gross free air is seen. No active pulmonary disease.*"

15. Given Mr. Haksluoto's ongoing complaints and the abdominal x-ray findings, a CT scan without contrast was later performed. Dr. Shapiro reviewed, assessed and issued a report of the CT scan findings, stating, "*unremarkable appearing CT examination of the abdomen and pelvis. There is a small calcification within the distal aspect of the appendix; however, the appendix appears otherwise unremarkable.*"

16. Given the CT scan findings erroneously reported by Dr. Shapiro, Mr. Haksluoto was improperly discharged. The final diagnosis was acute gastritis, acute vomiting, acute diarrhea, severe abdominal pain, and acute ileus.

17. Plaintiffs' experts are critical of the reading of the CT scan, as the CT scan was not normal.

18. Mr. Haksluoto returned to Mt. Clemens on December 29, 2011, with complaints of acute nausea, vomiting and diarrhea. According to the Mt. Clemens records, Mr. Haksluoto was seen in the emergency room department the previous Monday and given anti-emetics and pain medications. The records also state that a CT scan of the abdomen and pelvis on December 26, 2011 was "unremarkable." Unfortunately, the erroneous "unremarkable" CT scan led the physicians who treated Mr. Haksluoto during the December 29 admission to diagnose "viral gastroenteritis or bacterial colitis," and Mr. Haksluoto was once again discharged from Mt. Clemens without proper diagnosis and treatment.

19. Had Dr. Shapiro read and reported the December 26 CT scan correctly, Mr. Haksluoto would have been treated on December 26 and he would have likely avoided the December 29 emergency room visit and the resulting perforation and ruptured hemicolon.

20. On January 6, 2012, Mr. Haksluoto returned to Mt. Clemens with complaints of severe abdominal pain which was sharp and stabbing in nature along with emesis ("black

bile"). Mr. Haksluoto provided a history of recently being seen in the hospital on December 26 and December 29.

21. Given Mr. Haksluoto's severe and ongoing complaints, an abdominal series was performed at the time, which revealed "*a large amount of free intraperitoneal air. Residual oral contrast is seen in the small bowel and colon from the prior upper GI. Impression: Free intraperitoneal air.*"

22. Due to the clinical and diagnostic findings, Mr. Haksluoto was emergently taken to the operating room for surgical intervention.

23. The post-operative diagnosis was reported as "perforated abdominal viscus, status post subtotal colectomy secondary to perforation, colon obstruction with ischemia and sepsis and anastomotic breakdown of small bowel anastomosis with free perforation into the abdomen."

24. As a result of the failure of Mt. Clemens, General Radiology and Dr. Shapiro, and any and all of their employees and/or agents, including the above mentioned individuals and/or entities involved in the treatment of Mr. Haksluoto in connection with their failure to properly read/report the CT scan on December 26, 2011, which caused Mr. Haksluoto to be misdiagnosed and improperly treated, given the likely reliance of involved physicians on the reporting of the CT scan, and caused the following complications/damages including but not limited to the following: a perforated abdominal viscus with free intraperitoneal air requiring multiple surgeries including, but not limited to, a colectomy with ileostomy and exploratory laparotomies, ruptured hemicolon, and further resulting in abdominal sepsis, septic shock, acute kidney injury, respiratory failure, an anastomotic leak, peritonitis, necrosis, adhesions, a fistula, abdominal wounds, infections, internal bleeding, acute anemia, and scarring.

25. As a further result of the failure of Mt. Clemens, General Radiology and Dr. Shapiro, and any and all of their employees and/or agents, including the above mentioned individuals and/or entities involved in the treatment of Mr. Haksluoto in connection with their failure to properly read/report a CT scan on December 26, 2011, which caused Mr. Haksluoto to be misdiagnosed and improperly treated, given the likely reliance of involved physicians on the reporting of the CT scan, Mr. Haksluoto was caused to suffer unnecessary medical treatment, wage loss, attendant care, loss of household services, anxiety, discomfort, needless fright, shock, disability, scarring and depression, humiliation, emotional distress, excruciating pain, physical, emotional and financial hardship, severe pain and discomfort, loss of enjoyment of life, limitation of normal activities, extreme embarrassment, mental anguish and unnecessary medical expenses.

COUNT I

26. Plaintiffs re-allege and incorporate by reference the allegations set forth in paragraphs 1 through 25 as though more fully set forth herein.

27. Mt. Clemens holds itself out as a health care provider for the public.

28. Mt. Clemens undertook, through Dr. Shapiro, to adhere to the appropriate standard of care for radiologists.

29. Mt. Clemens stands liable for the negligent acts of Dr. Shapiro.

30. Mt. Clemens held a duty to act in accordance with the recognized standard of care applicable to radiologists for the treatment rendered to Mr. Haksluoto.

31. While Mr. Haksluoto was being treated by Mt. Clemens, specifically by Dr. Shapiro, Mt. Clemens breached the duties it owed to Mr. Haksluoto in a manner including, but not limited to, the following:

a. Failing to properly interpret and report imaging studies in accordance with the acceptable standard of care for radiologists;

b. Failing to properly interpret, read, assess, detect and report upon the CT scan of December 26, 2011;

c. Failing to consider the possibility of an obstruction or ileus when reading and interpreting the CT scan of December 26, 2011;

d. Failing to recommend additional testing including but not limited to a colonoscopy and or additional CT scans, to further follow-up on the findings of the December 26, 2011 CT scan given the previous abdominal x-ray findings and Mr. Haksluoto's complaints of abdominal pain;

e. Failing to assess and interpret the CT scan in conjunction with the abdominal x-rays dated December 26, 2011 and compare the imaging, and explain the comparison including any differences between any findings.

f. Failing to detect and report abnormalities evident in the sigmoid colon;

g. Other areas of malpractice to be discovered.

32. The breaches of the standard of care by Mt. Clemens, by and through Dr. Shapiro, are further set forth in the Affidavit of Dr. Glick, attached as **Exhibit 1.**

33. As a direct and proximate result of the deviations from the standard of care by Mt. Clemens, by and through Dr. Shapiro, Mr. Haksluoto suffered misdiagnosis and improper treatment, given the likely reliance of involved physicians on the reporting of the CT scan, which caused the following complications/damages including, but not limited to, the following: a perforated abdominal viscus with free intraperitoneal air requiring multiple surgeries including, but not limited to, a colectomy with ileostomy and exploratory laparotomies, and further resulting in abdominal sepsis, septic shock, acute kidney injury, ruptured hemicolon, respiratory failure, an anastomotic leak, peritonitis, necrosis, adhesions, a fistula, abdominal wounds, infections, internal bleeding; acute anemia, and scarring. **See Exhibit 1, Affidavit of Dr. Simon.**

34. Furthermore, as a direct and proximate result of the deviations from the standard of care by Mt. Clemens, by and through Dr. Shapiro, Mr. Haksluoto suffered unnecessary medical treatment, wage loss, attendant care, loss of household services, anxiety, discomfort, needless fright, shock, disability, scarring and depression, humiliation, emotional distress, excruciating pain, physical, emotional and financial hardship, severe pain and discomfort, loss of enjoyment of life, limitation of normal activities, extreme embarrassment, mental anguish and unnecessary medical expenses.

35. WHEREFORE, Plaintiffs respectfully request that a judgment in excess of $25,000 be rendered against Defendants, together with costs, interest, and attorney fees so wrongfully incurred in prosecuting this action.

COUNT II

36. Plaintiffs re-allege and incorporate by reference the allegations set forth in paragraphs 1 through 35 as though more fully set forth herein.

37. General Radiology holds itself out as a health care provider for the public.

38. General Radiology undertook, through Dr. Shapiro, to adhere to the appropriate standard of care for radiologists.

39. General Radiology stands liable for the negligent acts of Dr. Shapiro.

40. General Radiology held a duty to act in accordance with the recognized standard of care applicable to radiologists for the treatment rendered to Mr. Haksluoto.

41. While Mr. Haksluoto was being treated by General Radiology, specifically by Dr. Shapiro, General Radiology breached the duties it owed to Mr. Haksluoto in a manner including, but not limited to, the following:

a. Failing to properly interpret and report imaging studies in accordance with the acceptable standard of care for radiologists;

b. Failing to properly interpret, read, assess, detect and report upon the CT scan of December 26, 2011;

c. Failing to consider the possibility of an obstruction or ileus when reading and interpreting the CT scan of December 26, 2011;

d. Failing to recommend additional testing including but not limited to a colonoscopy and or additional CT scans, to further follow-up on the findings of the December 26, 2011 CT scan given the previous abdominal x-ray findings and Mr. Haksluoto's complaints of abdominal pain;

e. Failing to assess and interpret the CT scan in conjunction with the abdominal x-rays dated December 26, 2011 and compare the imaging, and explain the comparison including any differences between any findings.

f. Failing to detect and report abnormalities evident in the sigmoid colon;

g. Other areas of malpractice to be discovered.

42. The breaches of the standard of care by General Radiology, by and through Dr. Shapiro, are further set forth in the Affidavit of Dr. Glick, attached as **Exhibit 1.**

43. As a direct and proximate result of the deviations from the standard of care by General Radiology, by and through Dr. Shapiro, Mr. Haksluoto suffered misdiagnosis and improper treatment given the likely reliance of involved physicians on the reporting of the CT scan, which caused the following complications/damages including, but not limited to, the following: a perforated abdominal viscus with free intraperitoneal air requiring multiple surgeries including, but not limited to, a colectomy with ileostomy and exploratory laparotomies, and further resulting in abdominal sepsis, septic shock, ruptured hemicolon, acute kidney injury, respiratory failure, an anastomotic leak, peritonitis, necrosis, adhesions, a fistula, abdominal wounds, infections, internal bleeding, acute anemia, and scarring. **See Exhibit 1, Affidavit of Dr. Simon.**

44. Furthermore, as a direct and proximate result of the deviations from the standard of care by General Radiology, by and through Dr. Shapiro, Mr. Haksluoto suffered

unnecessary medical treatment, wage loss, attendant care, loss of household services, anxiety, discomfort, needless fright, shock, disability, scarring and depression, humiliation, emotional distress, excruciating pain, physical, emotional and financial hardship, severe pain and discomfort, loss of enjoyment of life, limitation of normal activities, extreme embarrassment, mental anguish and unnecessary medical expenses.

45. WHEREFORE, Plaintiffs respectfully request that a judgment in excess of $25,000 be rendered against Defendants, together with costs, interest, and attorney fees so wrongfully incurred in prosecuting this action.

COUNT III

46. Plaintiffs re-allege and incorporate by reference the allegations set forth in paragraphs 1 through 45 as though more fully set forth herein.

47. Dr. Shapiro held a duty to act in accordance with the recognized standard of care applicable and exercised by like physicians for the treatment he rendered to Mr. Haksluoto.

48. Dr. Shapiro violated the duty owed to Mr. Haksluoto by deviating from the applicable stand of care in a manner including, but not limited to, the following:

a. Failing to properly interpret and report imaging studies in accordance with the acceptable standard of care for radiologists;

b. Failing to properly interpret, read, assess, detect and report upon the CT scan of December 26, 2011;

c. Failing to consider the possibility of an obstruction or ileus when reading and interpreting the CT scan of December 26, 2011;

d. Failing to recommend additional testing including but not limited to a colonoscopy and or additional CT scans, to further follow-up on the findings of the December 26, 2011 CT scan given the previous abdominal x-ray findings and Mr. Haksluoto's complaints of abdominal pain;

e. Failing to assess and interpret the CT scan in conjunction with the abdominal x-rays dated December 26, 2011 and compare the imaging, and explain the comparison including any differences between any findings.

f. Failing to detect and report abnormalities evident in the sigmoid colon;

g. Other areas of malpractice to be discovered.

49. The breaches of the standard of care by Dr. Shapiro are further set forth in the Affidavit of Dr. Glick attached as **Exhibit 1.**

50. As a direct and proximate result of the deviations from the standard of care by Dr. Shapiro, Mr. Haksluoto suffered misdiagnosis and improper treatment given the likely reliance of involved physicians on the reporting of the CT scan, which caused the following complications/damages including, but not limited to, the following: a perforated abdominal viscus with free intraperitoneal air requiring multiple surgeries including, but not limited to, a colectomy with ileostomy and exploratory laparotomies, and further resulting in abdominal sepsis, septic shock, acute kidney injury, ruptured hemicolon, respiratory failure, an anastomotic leak, peritonitis, necrosis, adhesions, a fistula, abdominal wounds, infections, internal bleeding, acute anemia, and scarring. **See Exhibit 1, Affidavit of Dr. Simon.**

51. Furthermore, as a direct and proximate result of Dr. Shapiro's deviations from the standard of care, Mr. Haksluoto also suffered unnecessary medical treatment, wage loss, attendant care, loss of household services, anxiety, discomfort, needless fright, shock, disability, scarring and depression, humiliation, emotional distress, excruciating pain, physical, emotional and financial hardship, severe pain and discomfort, loss of enjoyment of life, limitation of normal activities, extreme embarrassment, mental anguish and unnecessary medical expenses.

52. WHEREFORE, Plaintiffs respectfully request that a judgment in excess of $25,000 be rendered against Defendants, together with costs, interest, and attorney fees so wrongfully incurred in prosecuting this action.

LOSS OF CONSORTIUM OF PLAINTIFF CAROL HAKSLUOTO

53. Plaintiffs hereby re-allege and incorporate fully paragraphs 1 - 52 as if fully stated herein.

54. At all times relevant hereto Mr. Haksluoto was the lawful husband of Plaintiff Ms. Haksluoto.

55. As a direct and proximate cause of the acts or omissions constituting negligence and/or gross negligence of the above-named Defendants, Plaintiff Ms. Haksluoto has been deprived of the loss of consortium, compassion, companionship and society of her husband, Plaintiff Mr. Haksluoto, which includes, by way of illustration and not limitation:

a. The reasonable expenses of necessary medical care, treatment and services received by her husband;

b. The reasonable value of the services of her husband of which she has been deprived;

c. The reasonable value of the society, companionship and sexual relationship with her husband of which she has been deprived.

WHEREFORE, Plaintiffs, Mr. and Mrs. Haksluoto, respectfully request judgment in their favor against the Defendants, Mt. Clemens, General Radiology and Dr. Shapiro, jointly and severally, in whatever amount said Plaintiffs are found to be entitled, as determined by

the trier of fact, together with interest, costs, and attorney fees, and any other relief the Court finds appropriate.

Respectfully submitted,

HERTZ SCHRAM PC

By: _____
Steve J. Weiss (P32174)
Steven P. Jenkins (P59511)
Attorneys for Plaintiffs
1760 S. Telegraph Road, Suite 300
Bloomfield Hills, MI 48302-0183
(248) 335-5000

Dated: June 27, 2014

RECEIVED
JUN 27 2014
CARMELLA SABAUGH
MACOMB COUNTY CLERK

DEMAND FOR JURY TRIAL

Plaintiffs, JEFFREY HAKSLUOTO, and CAROL HAKSLUOTO by and through their attorneys, Hertz Schram PC, hereby demand a jury trial in the above-captioned matter.

Respectfully submitted,

HERTZ SCHRAM PC

By: _____
Steve J. Weiss (P32174)
Steven P. Jenkins (P59511)
Attorneys for Plaintiffs
1760 S. Telegraph Road, Suite 300
Bloomfield Hills, MI 48302-0183
(248) 335-5000

Dated: June 27, 2014

EXHIBIT 1

RECEIVED
JUN 27 2014
CARMELLA SABAUGH
MACOMB COUNTY CLERK

AFFIDAVIT OF MERIT OF SETH N. GLICK, M.D.

STATE OF PENNSYLVANIA)
PHILADELPHIA) SS.
COUNTY OF ~~MONTGOMERY~~)

I, Seth N. Glick, M.D., being first duly sworn, depose and state as follows:

1. I am a licensed physician in Pennsylvania and I am board-certified in radiology. In the years 2010 and 2011, more than 50% of my time was, and currently still is, devoted to the active clinical practice of radiology.

2. I have reviewed the following records and documents regarding Jeffrey Haksluoto ("Mr. Haksluoto"):

a. The pertinent imaging reports;
b. Various operative reports
c. The pertinent pathology reports;
d. A CD-ROM containing Mr. Haksluoto's imaging studies;
e. Notice of Intent to File Claim.

3. The applicable Standard of Care or Practice is to generally perform as a reasonably prudent physician in the area of radiology under similar circumstances.

4. Based upon my review of the aforementioned documentation, I am of the opinion that Eli E. Shapiro, DO ("Dr. Shapiro") individually, and/or General Radiology Assoc., P.C. and Mount Clemens Regional Medical Center by and through their agents, employees, medical personnel and physicians, including, but not limited to Dr. Shapiro (collectively hereafter "Dr. Shapiro"), breached the applicable standard of care owed to Mr.

Haksluoto in a manner including, but not limited to the following:

a. Failing to properly interpret and report imaging studies in accordance with the acceptable standard of care for radiologists;

b. Failing to properly interpret, read, assess, detect and report upon the CT scan of December 26, 2011;

c. Failing to document the likely existence of an obstruction or ileus when reading and interpreting the CT scan of December 26, 2011;

d. Failing to recommend additional testing including but not limited to a colonoscopy and or additional CT scans, to further follow-up on the findings of the December 26, 2011 CT scan given the previous abdominal x-ray findings and Mr. Haksluoto's complaints of abdominal pain;

e. Failing to assess and interpret the CT scan in conjunction with the abdominal x-rays dated December 26, 2011 and compare the imaging, and explain the comparison including any differences between any findings;

f. Failing to detect and report abnormalities evident in the sigmoid colon;

g. Other areas of malpractice to be discovered.

5. The actions that should have been taken in order to have complied with the applicable of Standard of Practice or Care are essentially doing those items which were not done as listed in the preceding paragraph, paragraph number 4, and include the following::

a. Properly interpret and report imaging studies in accordance with the acceptable standard of care for radiologists;

b. Properly interpret, read, assess, detect and report upon the CT scan of December 26, 2011;

c. Consider the possibility of an obstruction or ileus when reading and interpreting the CT scan of December 26, 2011;

d. Recommend additional testing including but not limited to a colonoscopy and or additional CT scans, to further follow-up on the findings of the December 26, 2011 CT scan given the previous abdominal x-ray findings and Mr. Haksluoto's complaints of abdominal pain;

e. Assess and interpret the CT scan in conjunction with the abdominal x-rays dated December 26, 2011 and compare the imaging, and explain the comparison including any differences between any findings.

f. Detect and report abnormalities evident in the sigmoid colon;

g. Other areas of malpractice to be discovered.

6. The failure of Dr. Shapiro to properly adhere to the Standard of Care, as outlined in paragraph 4, including, but not limited to, properly interpret and report imaging studies in accordance with the acceptable standard of care for radiologists, properly interpret, read, assess, and report upon the CT scan of December 26, 2011, consider the possibility of an obstruction or ileus when reading and interpreting the CT scan of December 26, 2011, recommend additional testing including but not limited to a colonoscopy and or additional CT scans, to further follow-up on the findings of the December 26, 2011 CT scan given the previous abdominal x-ray findings and Mr. Haksluoto's complaints of abdominal pain; properly read and report any and all abnormalities on the CT scan dated December 26, 2011, properly diagnose an ileus/ obstruction and detect/ report abnormalities evident in the sigmoid colon; more likely than not, caused Mr. Haksluoto to be misdiagnosed given the likely reliance of involved

physicians on the reporting of the CT scan and improperly discharged and caused the following complications/damages including but not limited to the following: a perforated abdominal viscus with free intraperitoneal air requiring multiple surgeries including but limited to a colectomy with ileostomy and further resulting in septic shock, an acute kidney injury, respiratory failure, an anastomotic leak and fistula, abdominal wounds, necrosis, abdominal sepsis, peritonitis, internal bleeding, acute anemia, infections, and scarring. Had the appropriate care been provided, as listed above, including but not limited to properly interpreting, reading, assessing and reporting upon the December 26, 2011 CT scan, the ileus/obstruction would have been properly identified and treated and the above mentioned complications/damages would have, more likely than not, been prevented.

7. The above attestations are based upon information contained in Mr. Haksluoto's medical records which are currently possessed by the undersigned. I reserve the right to modify and/or offer additional opinions in the event further records or evidence is provided to me after discovery has been initiated.

8. If called to testify as a witness in this case, I am competent and qualified to testify to the above statement.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on 6/13/14.

Seth N. Glick, M.D.

Seth N. Glick, M.D.

Subscribed and sworn to before me this
13th day of June 2014, by Seth N. Glick, M.D.
~~Personally known to me or~~ proved to me on the basis of Satisfactory evidence to be the person who appeared before me.

Notary Public REGINA J. BROWN
PHILADELPHIA County, PENNSYLVANIA
My Commission expires: 11/17/16

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
REGINA J BROWN
Notary Public
SPRINGFIELD TWP, DELAWARE COUNTY
My Commission Expires Nov 17, 2016

AFFIDAVIT OF MERIT OF FRED SIMON, JR., M.D.

STATE OF CALIFORNIA)
) SS.
COUNTY OF San Diego

I, Fred Simon, Jr., M.D., being first duly sworn, depose and state as follows:

1. I am a licensed physician in California and I am board-certified in general surgery.

2. I have reviewed the following records and documents regarding Jeffrey Haksluoto ("Mr. Haksluoto"):

   a. The pertinent operative reports
   b. The pertinent pathology reports;
   c. The pertinent imaging study reports;
   d. The Affidavit of Merit of Dr. Seth Glick; and
   d. The Notice of Intent to File Claim.

3. Based upon my review of the aforementioned documentation, I am of the opinion that as a result of the deviations from the standard of care by Dr. Eli Shapiro, General Radiology Assoc., P.C. and Mt. Clemens Regional Medical Center to the extent they are responsible for him (collectively hereafter "Dr. Shapiro"), as attested to by Seth Glick, M.D., in his Affidavit of Merit, Mr. Haksluoto was misdiagnosed, improperly treated and untimely discharged. This, in time, caused Mr. Haksluoto to suffer decline in his medical status, and severe and life-threatening complications, including but not limited to a perforated abdominal viscus with free intra-peritoneal air, abdominal sepsis, septic shock, acute kidney injury, respiratory failure, an anastomosis leak, peritonitis, necrosis, adhesions, a fistula, infection, internal bleeding, acute anemia, abdominal wounds, and scarring resulting in the need for multiple surgeries including but limited to a colectomy with ileostomy, colostomy, and multiple exploratory laparotomies (collectively hereafter "damages").

4. Mr. Haksluoto's above referenced damages were foreseeable in light of the breaches in the standard of care occurred, as attested to by Dr. Glick. Mr. Haksluoto's above mentioned damages would, more likely than not, have been avoided had Dr. Shapiro adhered to the standard of care as attested to in Dr. Glick's Affidavit of Meritorious Claim. But for these breaches, Mr. Haksluoto would have undergone a timely decompression, insertion of an NG tube, and he would have been surgically managed appropriately. Mr. Haksluoto most likely would have undergone a resection of the affected area prior to perforation and without suffering the many sequelae outlined above.

5. If called to testify as a witness in this case, I am competent and qualified to testify to the above statement.

6. The above attestations are based upon information contained in Mr. Haksluoto's medical records, which are currently possessed by the undersigned.

7. I reserve the right to modify and/or offer additional opinions in the event further records or evidence are provided to me after discovery has been initiated.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6-14-2014

Fred Simon, Jr., MD

Subscribed and sworn to before me this
14th day of June 2014, by Fred Simon, Jr., MD
proved to me on the basis of satisfactory evidence
to be the person who appeared before me.

Notary Public Derik J. Munot
CA County, San Diego
My Commission expires: Nov 1, 2016

DERIK J. MUNOT
Commission # 1996768
Notary Public - California
San Diego County
My Comm. Expires Nov 1, 2016

EXHIBIT C

Dewan v. Khoury

Court of Appeals of Michigan
March 28, 2006, Decided
No. 265020

Reporter: 2006 Mich. App. LEXIS 884; 2006 WL 785389

CATHERINE DEWAN, Plaintiff-Appellant, v ELIE G. KHOURY, M.D., ORTHOPEDIC SURGERY OF MICHIGAN, and ST. MARY'S MERCY HOSPITAL, a/k/a TRINITY HEALTH SYSTEM, Defendants-Appellees.

Subsequent History: Appeal denied by *Dewan v. Khoury*, 2006 Mich. LEXIS 2152 (Mich., Oct. 13, 2006)

Prior History: Wayne Circuit Court. LC No. 04-437134-NH.

Disposition: Affirmed.

Core Terms

limitations period, expired, statute of limitations, days, summary disposition, tolling, medical malpractice action, trial court, file suit, wait, trial court's, decision, tolling period, filing suit, time period, last day, malpractice, untimely, Surgery, shorten, notice, novo

Judges: Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants in this medical malpractice case. We affirm.

On June 4, 2002, plaintiff underwent knee surgery performed by defendant Khoury at defendant St. Mary's Mercy Hospital. Complications ensued, requiring further treatment. [1] On June 4, 2004, plaintiff served a notice of intent (NOI) to file a medical malpractice action, as required by *MCL 600.2912d*. Thereafter, plaintiff was required to wait 182 days before filing suit, unless no response to the notice was received after 154 days. *MCL 600.2912b(1)*. During the time period relevant to this case, the filing of a NOI tolled the statute of limitations for 182 days. *MCL 600.5856(d)*. [2] The 182-day period ended on Friday, December 3, 2004. Plaintiff [*2] filed suit on Monday, December 6, 2004.

Khoury and his professional corporation, Orthopedic Surgery of Michigan, moved for summary disposition pursuant to *MCR 2.116(C)(7)*, arguing that plaintiff's complaint was barred by the statute of limitations. Khoury asserted that the statute of limitations tolling provision extended the [*3] time period in which plaintiff could file suit until December 3, 2004, but that the action was untimely because plaintiff did not file suit until December 6, 2004. St. Mary's concurred in Khoury's motion. The trial court agreed and granted the motion, and subsequently denied plaintiff's motion for reconsideration.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell, 249 Mich. App. 468, 479; 642 N.W.2d 406 (2001)*. Absent a disputed factual issue, the determination whether a claim is barred by the expiration of a limitations period is a question of law subject to de novo review. *Young v Sellers, 254 Mich. App. 447, 450; 657 N.W.2d 555 (2002)*.

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendants. She asserts that by holding that her complaint, filed the next business

[1] The alleged medical malpractice occurred on June 4, 2002; therefore, plaintiff's cause of action accrued on that date. MCL 600.5838a(1); *Solowy v Oakwood Hosp Corp*, 454 Mich. 214, 222; 561 N.W.2d 843 (1997). The statute of limitations for a medical malpractice action is two years. MCL 600.5805(6). The limitations period for plaintiff's cause of action expired on June 4, 2004. See MCR 1.108(3).

[2] 2004 PA 87, effective April 1, 2004, rewrote MCL 600.5856. The amended version of the statute does not apply in this case.

day after expiration of the entire 182-day period, was untimely, the trial court shortened the NOI period to 181 days. Plaintiff contends that the filing of the NOI before midnight on June 4, 2004, left part of the day remaining, and thus left a portion [*4] of the statute of limitations unexpired. She concludes that because a portion of the statute of limitations was remaining on Monday, December 6, 2004, her complaint, filed on that day, was timely. We disagree.

The two-year statute of limitations for plaintiff's medical malpractice action expired on June 4, 2004, absent tolling. *MCL 600.5805(6)*; *MCR 1.108(3)*. Plaintiff served the NOI on June 4, 2004. The 182-day tolling period began running on June 5, 2005, *MCR 1.108(1)*, and expired on Friday, December 3, 2004. Plaintiff was required to wait the entire 182-day period before filing suit. See *Burton v Reed City Hosp, 471 Mich. 745, 747-748; 691 N.W.2d 424 (2005)*. However, because the limitations period expired on June 4, 2004, no time remained to toll during the 182-day period. Therefore, when the 182-day period ended, the statute of limitations did not resume running. Plaintiff had no time remaining in which to file suit. [3]

[*5] Plaintiff's assertion that some portion of the limitations period remained after the NOI was served is without merit because the 182-day tolling period did not begin until June 4, 2004, had passed in its entirety. *MCR 1.108(1)*. Moreover, contrary to plaintiff's assertion, the trial court's decision did not shorten the NOI period to 181 days. Plaintiff chose to wait until the last day of the limitations period in order to serve the NOI. The entire 182-day period elapsed in this case, but plaintiff's act of serving the NOI on the last day of the limitations period ensured that no time would remain in the limitations period when the 182-day period expired.

Affirmed.

/s/ Stephen L. Borrello

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

[3] If plaintiff had served the NOI on June 3, 2004, the 182-day period would have commenced on June, 4, 2004, and expired on December 2, 2004, with one day remaining in the limitations period. Under those circumstances, plaintiff could have timely filed her complaint on December 3, 2004.

EXHIBIT 4

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

JEFFREY HAKSLUOTO
and CAROL HAKSLUOTO,

Plaintiffs,

Case No. 14-2556-NH
Hon. Peter J. Maceroni

v

MT. CLEMENS REGIONAL MEDICAL CENTER,
N/K/A MCLAREN MACOMB,
GENERAL RADIOLOGY ASSOCIATES, P.C.,
And ELI SHAPIRO, D.O.,

Defendants.

HERTZ SCHRAM PC
Steve J. Weiss (P32174)
Steven P. Jenkins (P59511)
Daniel W. Rucker (P67832)
Attorneys for Plaintiffs
1760 S. Telegraph Rd., Suite 300
Bloomfield Hills, MI 48304
248-335-5000; fax 248-335-3346
sweiss@hertzschram.com

GIARMARCO, MULLINS & HORTON, P.C.
LeRoy H. Wulfmeier, III (P22583)
Jennifer A. Engelhardt (P64993)
Christopher J. Ryan (P74053)
Jared M. Trust (P72993)
Attorneys for Defendants
101 W. Big Beaver Rd.
10th Floor Columbia Center
Troy, MI 48084-5280
248-457-7000

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7),(8) AND (10)

Now come Plaintiffs, by and through their attorneys, Hertz Schram PC, and for their Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(7),(8), and (10) state as follows:

1. Admitted that the Complaint alleges medical malpractice occurring on December 26, 2011 and a two year limitations period extending to December 26, 2013. Denied as to the effect of tolling extending the limitations period only to June 26, 2014.

2. Admitted as to the date suit was filed but denied as to the running of the statute of limitations.

3. Denied that Plaintiffs failed to timely file their Complaint, and all other allegations being legal argument are answered in Plaintiffs' brief in support.

Defendants have incorrectly calculated the statute of limitations and have based their calculations upon an old version of an amended statute that was sometimes misinterpreted. The language of the amended statute confirms that Plaintiffs have timely filed their Complaint.

Respectfully submitted,

HERTZ SCHRAM PC

Steve J. Weiss (P32174)
Steven P. Jenkins (P59511)
Daniel W. Rucker (P67832)
Attorneys for Plaintiffs
1760 S. Telegraph Rd., Suite 300
Bloomfield Hills, MI 48304
248-335-5000; fax 248-335-3346
sweiss@hertzschram.com

Dated: July 31, 2014

BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURUSANT TO MCR 2.116(C)(7),(8) AND (10)

Defendants rely upon outdated, unpublished case law examining an old version of a statute that has been amended and come to the erroneous conclusion that Plaintiffs filed their Complaint after the running of the statute of limitations.

INTRODUCTION

The medical malpractice at issue in this case involved, in part, the reading of a CT scan by Defendant Eli Shapiro, D.O., on December 26, 2011. On December 26, 2013, Plaintiffs filed their notice of intent (NOI) to sue as required by MCL 600.2912b. (Defs' Ex. A.) On June 27, 2014, this Court received Plaintiffs' Complaint for filing. (Defs' Ex. B.) The Complaint was timely filed because MCL 600.5856 tolls the statute of limitations "at the time" the NOI is mailed. Consequently, on the date that the NOI was mailed, December 26, 2013, the statute of limitations was immediately tolled, and that final day of the limitations period still remained available to file a complaint after the 182-day period. MCR 1.108(1) requires that the 182-day period of tolling begin the day after mailing and include "the last day of the period." Thus, the 182-day period is computed to begin on December 27, 2013, the day after the filing, and includes within the tolling period the date of June 26, 2014. Therefore, Plaintiffs properly filed their Complaint on June 27, 2014, the single remaining day of the statute of limitations following the 182-day tolling period that included June 26, 2014. In other words, the statute was tolled on December 26, 2013, the date Plaintiffs mailed their NOI, and the statute was still tolled on June 26, 2014, when the 182-day period ended, and then there was one remaining day in the statute of limitations to file, June 27, 2014. When the Complaint was filed on June 27, 2014, the statute was again tolled. Consequently, from June 26, 2014 forward, there has never been a day when the statute was not tolled.

STANDARD OF REVIEW

For purposes of this motion only, Plaintiffs accept Defendants statement of the standards of review.

ARGUMENT

Defendants have relied upon an inapplicable, old version of an amended statute and unpublished case law interpreting the old version of the statute to come to the erroneous conclusion that Plaintiffs' Complaint is barred by the statute of limitations. Case law before and after the amendment of MCR 600.5856 supports the timely filing of Plaintiffs' Complaint, and the amendment itself confirms the timeliness of the Complaint.

Defendants rely upon *Dewan v Khoury*, unpublished opinion *per curiam* of the Court of Appeals, Mar. 28, 2006 (Dkt. No. 265020), leave denied 477 Mich 888 (2006) (Defs' Ex. C). **Notably, Defendants would like this Court to deny Plaintiffs the right to their day in Court on the basis of an unpublished opinion that lacks precedential value and interprets a previous version of the statute that has been significantly altered since.** The second footnote of that decision reads as follows: "2004 PA 87, ***effective April 1, 2004***, rewrote MCL 600.5856. The amended version of the statute does not apply in this case." *Id.* at *1 n2 (emphasis added). Thus, the court addressed an old version of the statute not applicable here. In *Dewan*, the court relied on the computation of time rules in MCR 1.108 and determined tolling began on the day after the date that the NOI was mailed and included the final date of the 182-day period. *Id.* at *4-5. Critically, the court cited MCR 1.108(1) and held that when the NOI was served on June 4, 2004, "*the 182-day tolling period did not begin until June 4, 2004, had passed in its entirety.*" *Id.* at *5 (emphasis added). **The holding created an absurdity within the statutory scheme wherein an NOI was timely filed, but a timely filed complaint was deemed impossible.** Moreover, the holding directly conflicts with the amended version of the tolling statute.

Prior to the 2004 amendment, MCL 600.5856 stated, in relevant part:

> The statutes of limitations or reposed are tolled:
> (a) At the time the complaint is filed and a copy of the summons and complaint are served on the defendant.
> * * * * *
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is give in compliance with section 2912b.

After the 2004 amendment, MCL 600.5856 states, in relevant part:

> *The statutes of limitations or repose are tolled in any of the following circumstances:*
> (a) *At the time* the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.
> * * * * *
> (c) *At the time notice is given* in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days remaining in the applicable notice period after the date notice is given. [Emphasis added.]

In *Bush v Shabahang*, 484 Mich 156, 170 (2009), the Court stated that the "former version of § 5856 [] is no longer in existence. The Legislature, in exercising its authority, has changed the language of the statute and we must abide by that action." The Court explained that modification of § 5856 involved statutory construction requiring the Court to look to the language of the statute; to interpret the language consistent with legislative intent; to give effect to every phrase, clause, and word in the statute; to read the statutory language in its grammatical context unless something else was clearly intended; to read the statute as a whole; to read the statute in the context of the entire legislative scheme; to determine the plain meaning of words; to read the statute in conjunction with other relevant statutes; to read the statute in a manner to ensure harmony with the entire statutory scheme; to pay attention to amendments because changes in the statute are presumed to reflect legislative change in or clarification of the meaning of the statute; and to consider legislative history. *Id.* at 166-68 (citations omitted).

Bush dealt specifically with the change from former § 5856(d) to amended § 5856(c), and the Court stated that "it is clear that the focus of the operative language has been clarified." *Id.* at 169. Notably, the Court held that if a plaintiff complies with the notice period for mailing an NOI, "the statute of limitations is tolled." *Id.* The Court did not hold that if one complies with the notice period for serving an NOI, the statute of limitations *would be tolled the next day*, which was the conclusion in *Dewan* under the old statute. The Court's statement in *Bush* is justified by the change in language of the statute which now says the statute is tolled "***[a]t the time notice is given***," § 5856(c), while the old statute did not specify when the tolling began, § 5856(d) (pre-2004 version).

Support for interpreting "[a]t the time" as meaning immediate tolling is also found by reviewing other provisions of § 5856. In particular, § 5856(a) states that "[a]t the time" the complaint is filed, the statutes of limitations and repose are tolled. MCL 600.5856(a). Plaintiffs have found no cases where filing a complaint under MCL 600.5856(a) caused the limitations period to end the day after filing. That would create an absurd result where one could file a complaint on the last day of the statutory period but be barred because the statute continued to run until the next day. The interpretation of "at the time," therefore, means that tolling occurs immediately on the day that the filing occurs under § 5856(a) or service of the NOI occurs under § 5856(c).

It is also noteworthy that claims of medical malpractice accrue "at the time" of the act or omission that is the basis for the claim of malpractice. MCL 600.5838a. If the phrase "at the time" does not mean immediately on the day of the act, then the statute of limitations in this case did not accrue on the alleged date that Dr. Shapiro misread Plaintiff Jeffrey Haksluoto's CT scan, December 26, 2011, but accrued the next day on December 27, 2011. This would cause the statute of limitations to end on December 27, 2013 and Plaintiffs served the NOI on December

26, 2013. This leaves Plaintiffs with one extra day to file their claim whether "at the time" is interpreted to mean the same day or is interpreted to mean the day after the event. Either the claim accrues immediately on the same day as the act and tolling occurs in the same manner, or "at the time" means that the critical date is the day after the event. Plaintiffs do not agree with the latter interpretation, but under either interpretation, Plaintiffs had one remaining day to file their Complaint after the 182-day notice period that included June 26, 2014.

The statute relative to service of an NOI proceeds to state that the statute is tolled for a period not longer than the number of days "remaining in the applicable notice period after the date notice is given." MCL 600.5856(c). In other words, this second component of the § 5856(c) requires that the 182-day notice period begins the day after the NOI is mailed. Because the statute, the Supreme Court in *Bush*, and relevant medical malpractice statutes all confirm that the statute of limitations is tolled immediately on the day that the NOI is served, that day is withdrawn from the computation of the statute of limitations. In sum, § 5856(c) dictates tolling on the day the NOI is mailed and then for 182 days starting the day after the NOI is mailed. This leaves *at least one day* remaining in the statute of limitations after the NOI is served before the expiration of the two year limitations period for medical malpractice as set forth in MCL 600.5805(6).

In the present case, the NOI was served on December 26, 2013. Based upon the opening language of § 5856(c) and the statements of the Court in *Bush*, the statute of limitations was tolled immediately on that day. This left one day of the two year statute of limitations remaining for Plaintiffs to file their Complaint. The closing language of § 5856(c) requires that the 182-day notice period start a day later, on December 27, 2013, which would extend tolling up through an including June 26, 2014.

MCL 600.2912b requires that a plaintiff "shall not commence an action alleging medical practice . . . unless the person has given . . . written notice under this section not less than 182 days before the action is commenced." When the NOI was mailed, Plaintiffs were required to allow 182 days to completely elapse before filing the Complaint. Like the final portion of § 5856(c), Rule 1.108 provides that the computation of this 182-day period begins on the day after the NOI is served and that "[t]he last day of the period is included." MCR 1.108(1). In this case, the day after the NOI was filed was December 27, 2013, and day 182 was June 26, 2014. Therefore, pursuant to MCR 1.108(1) and the final portion of § 5856(c), Plaintiffs could not file the Complaint on June 26, 2014 and were required to wait until June 27, 2014, which was one day after the 182-day period.

The difference between the *Dewan* analysis and the present case is not the analysis of the function of MCR 1.108(1), but the modification of the opening language of MCL 600.5856(c) to require tolling immediately upon December 26, 2013. This prevented the statute of limitations from running on December 26, 2013 and allowed Plaintiffs to retain that day as a day available under the statute of limitations. In conjunction with the computation of time in MCR 1.108(1) and the final portion of § 5856(c), preventing filing on any day prior to June 27, 2014, the immediate tolling in MCL 600.5856(c) left one remaining day in the statute of limitations for filing after the 182-day notice period that included June 26, 2014.

The court rule should not be read in a manner to create a conflict with the statute, but if there is an irreconcilable conflict, the statute controls over the court rule because the limitations period is a not a matter of court practice or procedure under the Supreme Court's exclusive authority. *See People v Watkins*, 491 Mich 450, 467, 472-73 (2012). Section 5856(c) and MCR 1.108(1) work together to immediately toll the medical malpractice limitations period on December 26, 2013 and to initiate a 182-day tolling period that began on December 27, 2013 and

included the final day of June 26, 2014. Plaintiffs could not file before or after June 27, 2014, but their filing on that date was proper because they effectively reserved a day of the limitations period because the limitations period was tolled "at the time" the NOI was mailed on December 26, 2013.

Prior to the 2004 amendment clarifying that § 5856(c) (previously § 5856(d)) immediately tolls the statute of limitations, various courts had interpreted the former § 5856(d) in accordance with the 2004 immediate tolling clarification. For instance, in *Crockett v Fieger Fieger Kenney & Johnson, PC*, unpublished opinion *per curiam* of the Court of Appeals, Oct. 28, 2003 (Dkt. No. 240863), 2003 Mich App Lexis 2768 (attached as **Ex. 1**); the court analyzed the time period for filing under former § 5856(d) in accordance with the 2004 legislative clarification of the statute. In *Crockett*, the court examined the timing of serving an NOI and filing a complaint where the claim began to accrue on April 10, 1996. *Id.* at *3, *5 n1. The court determined that if an NOI was sent on the last day of the limitations period, April 10, 1998, the limitations period would have been tolled until Friday, October 9, 1998 pursuant to MCL 600.5856(d), and the plaintiff would have been able to timely file a complaint on the following Monday, October 12, 1998 pursuant to MCR 1.108(1). *Id.* at *5 n1. From April 10, 1998 to October 9, 1998 in *Crockett* is exactly the same number of days as December 26, 2013 to June 26, 2014 in the present case. In *Crockett*, the court held that the plaintiff would have one additional day to file after the 182-day period closed when the NOI was filed on the last day of the limitations period. This extended the filing date until October 12, 1998 in *Crockett* because October 10 and 11 were the weekend. Here, the one additional day after the 182-day period was June 27, 2014, the date that Plaintiffs filed their Complaint. Thus, *Crockett* is an example of cases before the 2004 amendment clarifying § 5856 that demonstrates that the date the NOI is

served is removed from the limitations calculus and is retained after the 182-day period computed according to MCR 1.108(1).

After the 2004 amendment to § 5856, the calculation of the 182-day period of tolling continues to be construed as it was in cases like *Crockett*. For instance, in *Burton v Macha*, 303 Mich App 750, 753, 756; 846 NW2d 419 (2014), the Court of Appeals addressed an NOI filed on December 16, 2010. The court analyzed § 5856(c), as amended in 2004, and held as a necessary part of the court's decision on the statute of repose that the 182-day notice period expired on June 17, 2011. *Id.* at 756-57. Thus, in *Burton* the NOI was filed on December 16, 2010 and the plaintiff could not file a complaint until June 17, 2011. If this Court adds 10 days to the dates in *Burton*, it is the exact case presented by Plaintiffs here. Rather than **December 16 in *Burton***, the NOI was served on **December 26 here**, and rather than an allowable filing date of **June 17 in *Burton***, the allowable filing date was **June 27 here**. *Burton* is a published case that shows Plaintiffs correctly performed the intricate § 5856(c) calculations and MCR 1.108(1) computations.

In short, amended § 5856(c) clarifies that tolling is immediately effective on the day that the NOI is filed, and MCR 1.108(1) begins the counting of the 182-day period the day after the NOI is filed. The sum of the statute and court rule results in the statute of limitations being tolled on December 26, 2013, with that day preserved for future filing, and with the 182-day notice period being counted from December 27, 2013 and progressing through, and including, June 26, 2014. The remaining day to file followed June 26 and fell on Friday, June 27, 2014, the day that Plaintiffs filed their Complaint.

Defendants inappropriately posture that Plaintiffs must file their Complaint on day 182 of the notice period. This is not permitted. Plaintiffs must file on day 183 after the 182-day notice period has fully expired. MCL 600.2912b. Furthermore, Plaintiffs still had an available day

within the statute of limitations to file on day 183. This reasoning does not extend a 182-day tolling period to 183 days. Instead, it allows for the reconciliation of the § 5856(c) initial statement that tolling begins "at the time" notice is given with the final statement of § 5856(c) and with MCR 1.108(1)'s method of measuring days in a manner that is convenient and uniform. Section 5856(c) indicates that tolling begins immediately, but neither the final portion of § 5856(c) nor MCR 1.108(1) counts the first of the 182 days until the next full day is complete, which is the day after the statute was tolled pursuant to § 5856(c). This "long first day" of the 182-day period is a reasonable method by which the Supreme Court has, in Rule 1.108(1), chosen to count full days in any period of days rather than requiring parties and the courts to proceed with the exactitude of measuring such filing periods by the hour, minute, or second. The amendment of § 5856(c) conformed to this counting of the 182-day period in the final provisions of that section while explicitly stating that the statute was also tolled "at the time notice is given." Combining the immediate tolling of § 5856(c) with the "long first day" for computing time under 1.108(1), and incorporated into the final passage of § 5856(c), leads to a Complaint that was due for filing on June 27, 2014 in this case. Precisely the same time frame was endorsed in *Crockett* before the § 5856(c) clarifying amendment and in *Burton* after the § 5856(c) clarifying amendment.

Defendants attempt to persuade the Court to deny Plaintiffs the right to make their claims. Defendants argue with only the support of an unpublished opinion that lacks precedential value and interprets a prior version of the statute that has no current force or effect. What Defendants really urge is that the limitations period should be shortened by one day. They argue that the statute of limitations should not be tolled "at the time notice is given" but a day later. Thus, under their incorrect analysis, an NOI must always be sent a day before the statute of limitations expires or it will be impossible to timely file a complaint after the NOI period has

expired. The 2004 clarifying amendment of MCL 600.5856(c) eliminates such a "lost day" theory and the *Crockett* and *Burton* cases are examples of courts that have properly interpreted the intent of the Legislature.

Conclusion

For the reasons stated above, Plaintiffs respectfully request that the Court deny Defendants' Motion for Summary Disposition as the Complaint was timely filed.

Respectfully submitted,

HERTZ SCHRAM PC

Steve J. Weiss (P32174)
Steven P. Jenkins (P59511)
Daniel W. Rucker (P67832)
Attorneys for Plaintiffs
1760 S. Telegraph Rd., Suite 300
Bloomfield Hills, MI 48304
248-335-5000; fax 248-335-3346
sweiss@hertzschram.com

Dated: July 31, 2014

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing ***Plaintiffs' Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(7), (8) and (10)*** was served upon the attorneys of record of all parties to the above cause at their respective addresses as disclosed on the pleadings of record herein on ***July 31, 2014*** by:

- ☒ First Class Mail
- ☒ Facsimile
- ☐ Overnight Mail
- ☐ Hand Delivery
- ☐ Certified Mail
- ☐ Other ____

I declare, under penalty of perjury, that the statement above is true to the best of my information, knowledge and belief.

Shannon Shaw, Legal Assistant

EXHIBIT 5

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

JEFFREY HAKSLUOTO
and **CAROL HAKSLUOTO,**

Plaintiffs,

Case No: 14-2556-NH
Hon. Peter J. Maceroni

-vs-

MT. CLEMENS REGIONAL MEDICAL CENTER, N/K/A MCLAREN MACOMB, GENERAL RADIOLOGY ASSOCIATES, P.C., and ELI SHAPIRO, D.O.,

Defendants.

STEVE J. WEISS (P32174)
STEVEN P. JENKINS (P59511)
HERTZ SCHRAM PC
Attorneys for Plaintiffs
1760 S. Telegraph Road, Suite 300
Bloomfield Hills, MI 48302-0183
(248) 335-5000 / Fax: (248) 335-3346
swelss@hertzschram.com

LeROY H. WULFMEIER, III (P22589)
JENNIFER A. ENGELHARDT (P64993)
CHRISTOPHER J. RYAN (P74053)
JARED M. TRUST (P72993)
GIARMARCO, MULLINS & HORTON,P.C.
Attorneys for Defendants
101 W. Big Beaver Rd.
10th Floor Columbia Center
Troy, MI 48084-5280
(248) 457-7000

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Plaintiffs' Response attempts to persuade the Court to accept their erroneously calculated dates to preserve their untimely claim by relying upon mistaken interpretations of law. The claim accrued on December 26, 2011; the Notice of Intent (NOI) was served on December 26, 2013; and the Complaint was untimely filed on June 27, 2014. Plaintiffs argue that the 2004 amendment to MCL 600.5856 changed the calculation of tolling, and thus

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

the statute of limitations, to make their June 27, 2014 filing timely. This amendment added the words, "at the time notice is given," to explicitly indicate when the statute of limitations would be tolled. However, this amendment has no bearing on the calculation at hand other than to reinforce that the Complaint was untimely as follows. Tolling began the date that the NOI was served, December 26, 2013, at a time when zero days were left in the statute of limitations. Day 1 of the 182-day period began on December 27, 2013, and day 182 ended on June 26, 2014. Because zero days remained in the statute of limitations period, once the 182 days expired, the statute of limitations immediately expired; Plaintiffs were not given an additional day to file suit and their Response is bereft of law explicitly holding same.

Plaintiffs incorrectly contend that they had an extra day to file their complaint under MCL 600.5856(c), MCR 1.108(1), and MCL 600.2912b, and that immediate tolling left *one* remaining day in the statute of limitations for filing after the 182-day notice period. This runs contrary to MCL 600.5856(c), which clearly states, "The statute is not tolled longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." Zero days remained at the time the NOI was served, not one; thus Plaintiffs' argument fails.

Plaintiffs then attempt to resurrect their claim by pointing to *Burton v Macha*, 303 Mich App 750; 846 NW2d 419 (2014). *Burton* involved the interplay of the filing of suit pursuant to the statute of repose, wrongful death savings provision, and discovery rule; none of these issues are at play in this matter. Burton neither addressed nor provided a holding about the tolling of NOIs served on the last day of the statute of limitations, with zero days left; it did, however, dismiss that claim because tolling did not apply to the statute of repose. Nonetheless, in that case the NOI was served on 12/16/10, and the Court noted that the plaintiff could not file suit

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

until June 17, 2011 (182 days) fully passed. Notwithstanding that the *Burton* Court dismissed that claim, it did not address the sentinel issue at hand: what to do with a tolled case where zero days remain in the statute of limitations. The Court of Appeals addressed this precise issue in *Dewan v Khoury*, as discussed in the underlying Motion. Plaintiff has yet to provide any law that expressly contradicts same.

Additionally, in support of their position, Defendants point to the case of *Lancaster v Wease*, Unpublished Opinion Per Curiam of the Court of Appeals, issued September 28, 2010 (Docket No. 291931), which is attached as **Exhibit A**. *Lancaster* completely undermines the Plaintiff's argument that filing an NOI on the last day of the statute of limitations tolls the statute by a single day (as Plaintiffs urge), as the Court in that case determined that filing the NOI the day before the statute of limitations expired provided only one day to file the Complaint. Analyzing the interplay between MCL 600.5856(c) and MCR 1.108(1), the *Lancaster* Court explained the following:

> Here, the alleged malpractice occurred during plaintiff's gastric bypass surgery on November 29, 2005. **Absent tolling, the period of limitations on plaintiff's malpractice claim would have expired on November 29, 2007. MCR 1.108(3); MCL 600.5805(6). Plaintiff served her notice of intent to file a malpractice claim on November 28, 2007.** Under MCL 600.5856(c), if the period of limitations would expire during the 182-day notice period (which it did in the instant case), the period of limitations is tolled "not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." **Here, the tolling period began running on November 29, 2007. MCR 1 .108(1). When the notice period expired on May 28, 2008, the period of limitations resumed running and expired one day later on May 29, 2008, because only one day in the limitations period had remained when the notice of intent was served.** *Id* at p 2-3.

Thus because the *Lancaster* plaintiff served her NOI one day before the statute of limitations expired, she had one day remaining to file her complaint. The same would have been true

had these Plaintiffs filed with one day remaining; they did not. Therefore, Plaintiffs failed to timely file their Complaint, and dismissal should be granted. (**Exhibit B**).[1]

Finally, Plaintiffs attempt to salvage their claim by arguing that it accrued one day after the alleged act giving rise their claim. This runs contrary to the established language of MCL 600.5838a(1), which provides that a malpractice claim, "accrues at the time of the act or omission that is the basis for the claim of medical malpractice." Defendants urge the Court to summarily reject this argument.

REQUEST FOR RELIEF

WHEREFORE, for the reasons stated above, Defendants respectfully request that this Honorable Court grant their Motion and enter Order dismissing Plaintiff's action in whole, consistent with the arguments in the within Reply and in their summary disposition motion.

Respectfully submitted,

GIARMARCO, MULLINS & HORTON, P.C.

By: _____

LeROY H. WULFMEIER, III (P22583)
JENNIFER A. ENGELHARDT (P64993)
JARED M. TRUST (P72993)
Attorneys for Defendants
101 W. Big Beaver Rd., Tenth Floor
Troy, MI 48084-5280
(248) 457-7000

Dated: August 6, 2014

[1] Exhibit B sets forth the day the NOI was served and the applicable calendar calculation.

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by mailing the same to them at their respective business addresses disclosed by the pleadings of record herein with postage fully pre-paid thereon on August 6, 2014.

Linda S. Allen

LINDA S. ALLEN
Legal Assistant

EXHIBIT A

Lancaster v. Wease

Court of Appeals of Michigan
September 28, 2010, Decided
No. 291931

Reporter: 2010 Mich. App. LEXIS 1819; 2010 WL 3767569

BRENDA LANCASTER, Plaintiff-Appellant, v GARY L. WEASE, M.D., and GARY L. WEASE, M.D., P.C., Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Genesee Circuit Court, LC No. 08-088836-NH.

Core Terms

notice, limitations period, malpractice, summary disposition, statute-of-limitations, defendants', affirmative defense, expired

Judges: Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) and dismissing plaintiff's complaint. We affirm.

This is a medical malpractice case arising from plaintiff's bariatric surgery performed by defendant Dr. Gary L. Wease. Dr. Wease performed a "Roux-en Y" gastric bypass procedure on plaintiff on November 29, 2005. On May 30, 2008, plaintiff filed the instant malpractice suit alleging that Dr. Wease improperly performed the procedure. The trial court granted defendants' motion for summary disposition, finding that plaintiff's complaint was barred by the statute of limitations.

Plaintiff first contends that the trial court erred in finding that her complaint was not timely filed. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Arthur Land Co, LLC v Otsego County, 249 Mich App 650, 661; 645 NW2d 50 (2002)*. Summary disposition is available under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. "A defendant who files a motion for [*2] summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence." *Turner v Mercy Hospitals & Health Services of Detroit, 210 Mich App 345, 348; 533 NW2d 365 (1995)*; see also *Patterson v Kleiman, 447 Mich 429, 432; 526 NW2d 879 (1994)*. If documentation is submitted, the court must consider it. MCR 2.116(G)(5). "If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff." *Turner, 210 Mich App at 348*. "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Center, 242 Mich App 703, 706; 620 NW2d 319 (2000)*.

The period of limitations in a medical malpractice action is two years. MCL 600.5805(6). A medical malpractice claim accrues at the time of the act or omission that is the basis for the claim. MCL 600.5838a(1). Here, the alleged malpractice occurred during plaintiff's gastric bypass surgery on [*3] November 29, 2005. Absent tolling, the period of limitations on plaintiff's malpractice claim would have expired on November 29, 2007. MCR 1.108(3); MCL 600.5805(6).

Plaintiff served her notice of intent [1] to file a malpractice claim on November 28, 2007. Under MCL 600.5856(c), if the period of limitations would expire during the 182-day notice period (which it did in the instant case), the period of limitations is tolled "not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." Here, the

[1] "[A] person shall not commence an action alleging medical malpractice against a health professional [*4] or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b(1). A plaintiff is required to wait the entire 182-day period before filing suit. *Burton v Reed City Hospital, 471 Mich 745, 747; 691 NW2d 424 (2005)*.

tolling period began running on November 29, 2007. MCR 1:108(1). When the notice period expired on May 28, 2008, the period of limitations resumed running and expired one day later on May 29, 2008, because only one day in the limitations period had remained when the notice of intent was filed. [2] Plaintiff did not file suit until May 30, 2008. Because plaintiff filed suit one day after the period of limitations expired, the trial court did not err in concluding that plaintiff's complaint was barred by the statute of limitations.

Plaintiff also asserts that the trial court erred in permitting defendants to assert the statute-of-limitations defense even though defendants failed to provide a sufficient factual basis supporting the defense. Review of plaintiff's unpreserved claim of error is limited to determining whether a plain error occurred that affected substantial rights. Kern v Blethen-Coluni, 240 Mich App 333, 336; 612 NW2d 838 (2000).

An affirmative defense, such as a statute-of-limitations defense, must be raised in a party's first responsive pleading or by motion filed not later than this responsive pleading; otherwise, the defense [*5] is waived. Attorney General ex rel Dept of Environmental Quality v Bulk Petroleum Corp, 276 Mich App 654, 664; 741 NW2d 857 (2007); MCR 2.111(F)(2) and (F)(3). A party must state the facts constituting an affirmative defense. MCR 2.111(F)(3)(a). "The underlying rationale for requiring a party to provide factual support for affirmative defenses is to prevent the adverse party from being taken by surprise at trial." Horvath v Delida, 213 Mich App 620, 630; 540 NW2d 760 (1995).

Paragraph four of defendants' affirmative defenses provided:

> 4. That if, during the course of discovery in this matter, it is substantiated that any of Plaintiff's claims are barred by the Statute of Limitations applicable to said cause, these Defendants reserve the right to bring on before this Court a Motion for summary Disposition on said basis.

It is true that defendants did not provide a factual basis for the statute-of-limitations defense. However, no affirmative defense will be held insufficient where the defense is "sufficient to permit the opposite party to take a responsive position." Hanon v Barber, 99 Mich App 851, 856; 298 NW2d 866 (1980) (internal citation and quotation marks omitted). Plaintiff does [*6] not suggest that she was surprised by the statute-of-limitations argument raised in defendants' motion for summary disposition, nor is there any evidence to suggest that plaintiff lacked enough notice of the defense to enable her to formulate a responsive position. Defendants have not presented some novel or unusual statute-of-limitations argument. Plaintiff did not require time or resources over and above what she had in order to adequately respond to defendants' argument. Defendants' statement in their affirmative-defenses document was sufficient to preserve a statute-of-limitations defense because it put plaintiff on notice that defendants might assert that the complaint was untimely filed. No plain error affecting substantial rights occurred. Accordingly, we conclude that reversal is unwarranted.

Affirmed.

/s/ Michael J. Talbot

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

[2] We note that May 29, 2008, was a Thursday, and therefore, it was possible for plaintiff to file suit on that day. Plaintiff's computation is one day off when she suggests that the period of limitations resumed running on May 29, 2008.

EXHIBIT B

Calendar Applicable to Current Case

December 2013 (United States)

timeanddate.com

January 2014

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2 New Moon	3	4	5	6	7
8	9 1st Quarter	10	11	12	13	14
15	16	17 Full Moon	18	19	20	21
22	23	24 Christmas Eve	25 Christmas Day, 3rd Quarter	26 NOI	27 Day 1	28 2
29 3	30 4	31 New Year's Eve	1 New Moon	2	3 1	4

5

January 2014 (United States)

timeanddate.com

February 2014

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	

Sun	Mon	Tue	Wed	Thu	Fri	Sat
29	30	31	1 New Year's Day New Moon	2	3	4
			6	7	8	9
5	6	7 1st Quarter	8	9	10	11
10	11	12	13	14	15	16
12	13	14	15 Full Moon	16	17	18
17	18	19	20	21	22	23
19	20 Martin Luther King Day	21	22	23	24 3rd Quarter	25
24	25	26	27	28	29	30
26	27	28	29	30 New Moon	31	1
31	32	33	34	35	36	

timeanddate.com

February 2014 (United States)

March 2014

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Sun	Mon	Tue	Wed	Thu	Fri	Sat
26	27	28	29	30 New Moon	31	1 37
2 38	3 39	4 40	5 41	6 1st Quarter 42	7 43	8 44
9 45	10 46	11 47	12 48	13 49	14 Valentine's Day Full Moon 50	15 51
16 52	17 Presidents' Day 53	18 54	19 55	20 56	21 57	22 3rd Quarter 58
23 59	24 60	25 61	26 62	27 63	28 64	1

timeanddate.com

March 2014 (United States)

April 2014

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

Sun	Mon	Tue	Wed	Thu	Fri	Sat
23	24	25	26	27	28	1 New Moon 65
2 66	3 67	4 68	5 69	6 70	7 71	8 1st Quarter 72
9 73	10 74	11 75	12 76	13 77	14 78	15 79
16 Full Moon 80	17 81	18 82	19 83	20 84	21 85	22 86
23 3rd Quarter 87	24 88	25 89	26 90	27 91	28 92	29 93
30 New Moon 94	31 95	1	2	3	4	5

timeanddate.com

April 2014 (United States)

May 2014

S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

Sun	Mon	Tue	Wed	Thu	Fri	Sat
30	31	1 96	2 97	3 98	4 99	5 100
6 101	7 ◐ 1st Quarter 102	8 103	9 104	10 105	11 106	12 107
13 Thomas Jefferson's Birthday 108	14 109	15 ○ Full Moon 110	16 111	17 112	18 113	19 114
20 Easter Sunday 115	21 116	22 ◑ 3rd Quarter 117	23 118	24 119	25 120	26 121
27 122	28 123	29 ● New Moon 124	30 125	1	2	3

timeanddate.com

May 2014 (United States)

June 2014

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

Sun	Mon	Tue	Wed	Thu	Fri	Sat
27	28	29	30	1 126	2 127	3 128
4 129	5 130	6 1st Quarter 131	7 132	8 133	9 134	10 135
11 Mothers' Day 136	12 137	13 138	14 Full Moon 139	15 140	16 141	17 142
18 143	19 144	20 145	21 3rd Quarter 146	22 147	23 148	24 149
25 150	26 Memorial Day 151	27 152	28 New Moon 153	29 154	30 155	31 156

timeanddate.com

June 2014 (United States)

July 2014

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

Sun	Mon	Tue	Wed	Thu	Fri	Sat
1 157	2 158	3 159	4 160	5 ◐ 1st Quarter 161	6 162	7 163
8 164	9 165	10 166	11 167	12 168	13 ○ Full Moon 169	14 170
15 Fathers' Day 171	16 172	17 173	18 174	19 ◑ 3rd Quarter 175	20 176	21 177
22 178	23 179	24 180	25 181	26 182	27 ● New Moon Zero days remaining in Statute of Limitation Period.	28
29	30	1	2	3	4 Independence Day	5

EXHIBIT 6

GMH GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

JEFFREY HAKSLUOTO
and **CAROL HAKSLUOTO,**

Plaintiffs,

Case No: 14-2556-NH
Hon. Peter J. Maceroni

-vs-

MT. CLEMENS REGIONAL MEDICAL CENTER, N/K/A MCLAREN MACOMB, GENERAL RADIOLOGY ASSOCIATES, P.C., and **ELI SHAPIRO, D.O.,**

Defendants.

STEVE J. WEISS (P32174)
STEVEN P. JENKINS (P59511)
HERTZ SCHRAM PC
Attorneys for Plaintiffs
1760 S. Telegraph Road, Suite 300
Bloomfield Hills, MI 48302-0183
(248) 335-5000 / Fax: (248) 335-3346
sweiss@hertzschram.com

LeROY H. WULFMEIER, III (P22583)
JENNIFER A. ENGELHARDT (P64993)
CHRISTOPHER J. RYAN (P74053)
JARED M. TRUST (P72993)
GIARMARCO, MULLINS & HORTON
Attorneys for Defendants
101 W. Big Beaver Rd.
10th Floor Columbia Center
Troy, MI 48084-5280
(248) 457-7000

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

NOW COME the Defendants, and for their Supplemental Brief, the filing of which was afforded for by this Honorable Court during oral argument on August 11, 2014, state as follows:

Introduction

During oral argument, Plaintiffs' Counsel recited holdings from various cases that he

GMH GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

suggested should be binding and persuasive upon this Honorable Court in rendering an opinion on the underlying summary disposition motion. Because none of these cases were presented in Response to the underlying motion, the Court generously afforded for the Defendants to respond to same. Upon review of the cases, all share a common thread, *i.e.*, the cases fail to support Plaintiffs' position in this case.

Discussion and Analysis

Addressing the four cases that Plaintiffs' Counsel provided at the time of oral argument of the Defendants' dispositive motion, none are binding with respect to the issue of the timeliness (or lack thereof) of Plaintiffs' Complaint. First, Plaintiffs' citation to *Swanson v Port Huron Hospital*, 290 Mich App 167 (2010) addressed a Notice of Intent (NOI) that was defective pursuant to MCL 600.2912b, and more specifically, the issue of whether or not Plaintiff set forth with the necessary specificity the alleged breaches of the standard of care and resultant proximate causation. The Court of Appeals ultimately concluded that the Plaintiff made a good faith attempt to satisfy MCL 600.2912b and found the NOI to be sufficient. Timeliness and tolling is not addressed in the holding of this case, and the fact section of the case failed to provide any specific dates (months only), upon which the Court could seek any particular guidance in this matter.

Similarly, Plaintiff's citation to *DeCosta v Cossage*, 486 Mich 116 (2010), fails to address the timeliness and tolling issue as is present in this case. Rather, *DeCosta* addressed *where* an NOI must be sent and whether an NOI sent to an incorrect address serves to toll the statute of limitations. Of note, the lawsuit in *DeCosta* was filed *170 days* after the NOI was served, presumably because there was no response to the NOI. As such,

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

DeCosta is likewise inapplicable to the instant lawsuit and offers nothing of value to the analysis of the issue at hand.

Plaintiffs further cite to *Kincaid v Cardwell et al,* 300 Mich App 513 (2013), which addresses the time in which a Plaintiff's claim accrues and the "last treatment rule." Because Plaintiff's Complaint was untimely based on the accrual date, it was dismissed. In Kincaid, the NOI was filed on April 5, 2010, and the Complaint was filed on November 30, 2010. The Court stated that if the patient's claim accrued on or after June 1, 2008, it would have been timely. *Id* at 524. This analysis supports Defendants' contention that the instant lawsuit is untimely by virtue of the math involved:

6/1/10 + 182 days: November 30, 2010
6/1/10+183 days: December 1, 2010

Thus, Plaintiffs' reliance upon this case is misplaced.

Finally, Plaintiff's citation to *Driver v Naini,* 490 Mich 239 (2011), fails to support their position. In *Driver*, the plaintiff unsuccessfully attempted to add a new defendant after suit was filed and after the statute of limitations had expired. In that case, the original suit was filed with less than 182 days passing from the service of the NOI, as the NOI was filed on 4/25/06, and the Complaint was filed 181 days later on 10/23/06. Notably, the Court did state that when, "a claimant files an NOI with time remaining on the applicable statute of limitations, that NOI tolls the statute of limitations for up to 182 days with regard to the recipients of the NOI." *Id* at 249. In this case, the NOI was filed with no time remaining on the statute, and therefore the statute would not be tolled any longer as urged by the Plaintiffs in this matter.

GMH GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

In sum, the cases cited by Plaintiffs' Counsel in oral argument do not support Plaintiffs' position that this lawsuit was timely filed, nor do they even lend supportive commentary to the arguments made on behalf of Plaintiffs.

Finally, Defendants submit that before the June 26, 2014 filing of the instant lawsuit, Plaintiffs' Counsel was well-aware of the calculation issues involved, having been the subject of a 2014 Court of Appeals Opinion issued some months earlier addressing the timeliness of a claim. In *Hardin v Prieskorn,* Unpublished Opinion Per Curiam of the Court of Appeals, issued September April 1, 2014 (Docket No. 311193), which is attached as **Exhibit A**, the attorney representing the Plaintiffs in this matter served an NOI where the date of loss was August 3, 2009. Thus, the NOI would have been served no later than August 3, 2011. In finding the *Hardin* Complaint untimely, the Court commented that the two-year limitations period with tolling expired on February 1, 2012, which was 182 days (not 183) after the last possible date that the NOI could be served. Thus, to stand before this Honorable Court and argue that the Complaint in this matter was appropriately filed on the 183rd day is misplaced.

REQUEST FOR RELIEF

WHEREFORE, for the reasons stated above and set forth within Defendants underlying submissions, Defendants respectfully request that this Honorable Court grant their Motion and enter Order dismissing Plaintiff's action in whole, consistent with the arguments in the within Reply and in their summary disposition motion.

GIARMARCO, MULLINS & HORTON, P.C.
ATTORNEYS AND COUNSELORS AT LAW
Tenth Floor Columbia Center ▾ 101 West Big Beaver Road ▾ Troy, Michigan 48084-5280 ▾ P: (248) 457-7000 ▾ F: (248) 457-7001 ▾ www.gmhlaw.com

Respectfully submitted,

GIARMARCO, MULLINS & HORTON, P.C.

By: _____

LeROY H. WULFMEIER, III (P22583)
JENNIFER A. ENGELHARDT (P64993)
JARED M. TRUST (P72993)
Attorneys for Defendants
101 W. Big Beaver Rd., Tenth Floor
Troy, MI 48084-5280
(248) 457-7000

Dated: August 13, 2014

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by mailing the same to them at their respective business addresses disclosed by the pleadings of record herein with postage fully pre-paid thereon on August 13, 2014.

_____
LINDA S. ALLEN
Legal Assistant

EXHIBIT A

STATE OF MICHIGAN

COURT OF APPEALS

DIANE HARDIN,

Plaintiff-Appellant,

v

DAVID W. PRIESKORN, D.O., and TRI-COUNTY ORTHOPEDICS, P.C.,

Defendant-Appellees.

UNPUBLISHED
April 1, 2014

No. 311193
Oakland Circuit Court
LC No. 2012-124878-NH

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7). We affirm.

Plaintiff brought this medical malpractice action in connection with injuries she allegedly received as a result of total knee replacement surgery that was performed by defendant Prieskorn on August 3, 2009. The issues properly before this Court are whether the limitations period was tolled by agreement of the parties and whether the doctrine of equitable estoppel applies so as to prevent defendants from using the statute of limitations as a defense.[1]

After plaintiff provided defendants with notice of intent to file suit, the limitations period was tolled for a period of 182 days, making February 1, 2012, the expiration date of the applicable two-year limitations period. MCL 600.2912b; MCL 600.5838a; MCL 600.5856.

[1] Plaintiff also argues that her complaint alleged negligence in connection with her post-surgical visits and that her complaint was timely filed with regard to these visits. Plaintiff fails to develop this issue with adequate authority and argument; she merely cites an unpublished case and also attempts to distinguish a case relied upon by defendants, stating that it provides "supportive commentary" for plaintiff's position. In light of the paucity of the briefing, we decline to address the issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority").

Plaintiff filed her complaint on February 10, 2012. Plaintiff alleges that sometime in January 2012 she entered into an oral agreement with James Olivetti, an employee of defendants' malpractice insurance provider, to toll the limitations period for two weeks.

This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681-682; 599 NW2d 546 (1999). "We consider all documentary evidence submitted by the parties and accept the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true." *Id.* "We view the uncontradicted allegations in favor of the plaintiff and determine whether the claim is time-barred." *Id.*

Plaintiff relies on the Supreme Court's decision in *Pitsch v Blandford*, 474 Mich 879; 704 NW2d 695 (2005), to support her position. Unlike in the present case, however, in *Pitsch*, *id.* at 879, the parties had entered into an unambiguous agreement to toll the statute of limitations. The Supreme Court held that because such an agreement was in place, it was to be enforced as written. *Id.* In the present case, there was insufficient evidence that *the parties* entered into a valid and enforceable agreement at all. As noted by defendant, plaintiff alleges only that a representative of defendants' insurance company orally agreed to toll the limitations period, and there was insufficient evidence that this person was authorized to bind defendants to such an agreement.[2] As such, plaintiff's reliance on *Pitsch* is misplaced. Because the existence of a clear and unambiguous agreement to toll the statute of limitations was not apparent from the evidence submitted, the trial court properly found that the *Pitsch* holding did not apply to the alleged oral agreement between the parties in the present case. Nor did the evidence submitted raise a factual issue for trial.

Plaintiff argues that equitable estoppel applies and barred defendants from raising the statute of limitations as a defense. For equitable estoppel to apply, plaintiff must establish that (1) defendants' acts or representations induced plaintiff to believe that the statutory limitations period would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on the belief. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008).

On January 25, 2012—seven days before the February 1, 2012, filing deadline—plaintiff's counsel, Steve Weiss, forwarded to Olivetti a written tolling agreement. Weiss asked Olivetti to review the proposed written agreement and contact him with any changes Olivetti thought necessary, or otherwise to sign and return it. Even assuming that Weiss had previously reached some sort of oral agreement with Olivetti, when Olivetti still had not signed the agreement or otherwise replied to the request by January 31, 2012, there was clearly no

[2] As noted by defendant, it is incumbent on the party who relies on an alleged agency to show what authority the agent actually had, see *Selected Investments Co v Brown*, 288 Mich 383, 388; 284 NW 918 (1939), and "[a]gency may not be established by proof of declarations by the supposed agent," *In re Union City Milk Co*, 329 Mich 506, 513; 46 NW2d 361 (1951).

justification to delay the filing of plaintiff's complaint further and allow the February 1, 2012, filing deadline to pass.[3]

The trial court properly found that justifiable reliance by plaintiff was absent and that the doctrine of equitable estoppel, therefore, did not apply to prevent defendants from raising the statute of limitations as a defense.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

[3] Moreover, as noted, Olivetti was merely a representative of defendants' insurer.

EXHIBIT 7

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

JEFFREY HAKSLUOTO
and CAROL HAKSLUOTO,

Plaintiffs,

v

MT. CLEMENS REGIONAL MEDICAL CENTER,
N/K/A MCLAREN MACOMB,
GENERAL RADIOLOGY ASSOCIATES, P.C.,
And ELI SHAPIRO, D.O.,

Defendants.

Case No. 14-2556-NH
Hon. Peter J. Maceroni

HERTZ SCHRAM PC
Steve J. Weiss (P32174)
Steven P. Jenkins (P59511)
Daniel W. Rucker (P67832)
Attorneys for Plaintiffs
1760 S. Telegraph Rd., Suite 300
Bloomfield Hills, MI 48304
248-335-5000; fax 248-335-3346
sweiss@hertzschram.com

GIARMARCO, MULLINS & HORTON, P.C.
LeRoy H. Wulfmeier, III (P22583)
Jennifer A. Engelhardt (P64993)
Christopher J. Ryan (P74053)
Jared M. Trust (P72993)
Attorneys for Defendants
101 W. Big Beaver Rd.
10th Floor Columbia Center
Troy, MI 48084-5280
248-457-7000

PLAINTIFFS' SUPPLEMENTAL RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURUSANT TO MCR 2.116(C)(7),(8) AND (10)

At hearing of Defendants' motion for summary disposition on August 11, 2014, the Court permitted Defendants to submit a supplemental brief, and the Court subsequently permitted Plaintiffs to file this supplemental brief. Plaintiffs' endeavor herein is to address citations they raised at oral argument and to respond to Defendants' recent citations.

In their Reply Brief, Defendants argued that *Dewan v Khoury* holds that an NOI mailed upon the last day of the statute of limitations leaves "zero days" remaining in which to file a complaint after the 182-day notice period. (Defs.' Reply at 3.) Defendants argued Plaintiffs provided no law contradicting this argument. (Defs.' Reply at 3.) However, Plaintiffs cited *Bush v Shabahang*, 484 Mich 156, 169-70; 772 NW2d 272 (2009), which addressed the amendment of MCL 600.5856, held that the statute had been clarified, and determined that when an NOI is mailed, the statute of limitations *is tolled* rather than *will be* tolled later. (Pls.' Resp. Br. at 5-6.)

At oral argument, Plaintiffs presented four published cases further establishing that the courts hold that there is time to file a medical malpractice complaint as long as the NOI is mailed within the statute of limitations period. In *DeCosta v Gossage*, 486 Mich 116, 123; 782 NW2d 734 (2010), the Court stated that under amended § 5856(c), tolling of the statute of limitations is "determined by the timeliness of the NOI" and if the "NOI is timely, the period of limitations is tolled" without regard to defects in the NOI. The Court then explained that the NOI mandates were not intended to impose "extraordinary measures" upon plaintiffs or to result in "exceedingly exacting interpretations" by courts but were meant to give advance notice to defendants and allow early resolution of claims. *Id.*

Defendants' position that the day of mailing an NOI is a day lost from the statute of limitations essentially causes plaintiffs to lose a day of the statute of limitations in every medical malpractice case. This is the type of "exceedingly exacting interpretation" of the NOI mandates that the Court in *DeCosta* counseled against. Nothing in the statutory scheme expressly states

that the statute of limitations continues to run on the day the NOI is mailed, and the amended § 5856(c) affirmatively states the limitations period is tolled "at the time" the notice is given. Contrary to *DeCosta*, Defendants' position (1) requires an exceedingly exacting interpretation of the NOI mandates and (2) compels plaintiffs to take "extraordinary measures" of anticipating how many days early a court will require an NOI to be mailed even though the statutory scheme does not suggest that the NOI must be mailed before the last day of the limitations period.[1]

At oral argument, Plaintiffs also cited *Kincaid v Cardwell*, 300 Mich App 513, 523-524 (2013), for the proposition that if an NOI is provided within two years of the accrual of a medical malpractice claim, the plaintiff is entitled to a 182-day notice period. The opinion states that the earliest accrual date for the claim "was April 25, 2008, and that **she gave her notice to sue within two years of that date. As such, she was entitled to the full 182 days of tolling under MCL 600.5856(c).**" *Id.* (emphasis added). This is precisely the position Plaintiffs take: if one mails an NOI within the statute of limitations, he is *entitled* to a 182 day notice period. A tolling period would be worthless, and the *Kincaid* opinion meaningless, if one entitled to 182 days of tolling reached the end of the period and had "zero days" remaining to file the complaint. What value is there in entitlement to tolling when the statute has already run? *Kincaid* is only sensible if one who is entitled to 182 days of tolling, by virtue of notice within the statute of limitations, also has access to at least one day following the tolling period in which to file a complaint.

Defendants suggest that the court in *Kincaid* required the plaintiff to file a complaint within 182 days of June 1, 2010 rather than one day after that period. (Defs.' Suppl. Br. at 3.) However, *the court was working backward* from the filing date of November 30, 2010 and stated

[1] Plaintiffs also referenced MCL 600.2301 in *DeCosta* for the principle that filing a complaint shortly before the end of an NOI period does not affect the "substantial rights of the parties." *DeCosta*, 486 Mich at 124. Plaintiffs' reference was in response to arguments in Defendants' Reply Brief suggesting Plaintiffs filed the Complaint within the notice period. (Defs.' Reply Br. at 2-3, citing *Burton v Macha*, 303 Mich App 750 ; 846 NW2d 419 (2014).)

that "if her medical malpractice claim accrued on or after June 1, 2008, which is two years and 182 days before the date she filed her complaint, her claim would be timely." *Kincaid*, 300 Mich App at 524. The court did not address when the statute of limitations would have accrued if the plaintiff had mailed an NOI on May 31, 2010. Plaintiff Kincaid had mailed her notice on April 5, 2010, so the court had no reason to decide whether an NOI sent on May 31, 2010 would have tolled the limitations on that day and allowed for a timely filing on November 30, 2010. *Id.* at 520. *What the court did say, as noted above, is that when one mails an NOI within the two year limitations period, the plaintiff is "entitled" to a 182-day tolling period.* Such a clear statement of entitlement is meaningless if the "entitlement" generates no opportunity to file a complaint after the notice period ends.

At oral argument, Plaintiffs' also cited *Driver v Naini*, 490 Mich 239, 249; 802 NW2d 311 (2011), which states that "[w]hen a claimant files an NOI with time remaining on the applicable statute of limitations, that NOI tolls the statute of limitations for up to 182 days with regard to the recipients of the NOI." *Id.* (citing MCL 600.5856(c)). The Court in *Driver* did not say that the NOI must be filed a day or two days before the limitations ends. The Court stated only that if there is "time remaining on the applicable statute of limitations," the NOI tolls the statute of limitations. *Id.* The Court proceeded to state in the very next sentence that this limitations time period is normally two years from the time the claim accrues. *Id.* Again, if according to *Driver* a plaintiff may properly serve an NOI with any time remaining in the statute of limitations and get the benefit of tolling during the 182-day notice period, the opinion would be nonsensical if there was not a single day following the 182-day period in which to file a complaint.

Defendants acknowledge the problem created for Defendants by the Court's language in *Driver* guaranteeing a 182-day notice period for NOIs served within the limitations period. (Defs.' Suppl. Br. at 3.) Defendants only answer is to suggest that there was no time remaining

in the statute of limitations on the day that Plaintiffs mailed their NOI. (Defs.' Suppl. Br. at 3.) However, in the very first paragraph of Defendants' original motion to dismiss, Defendants contended that the statute of limitations in this case extended through December 26, 2013. (Defs.' MSD at 1-2.) In fact, December 26, 2013 was within the two year statute of limitations, so Plaintiffs mailed their NOI while there was still "time remaining" in the limitations period.

At oral argument, Plaintiffs also cited *Swanson v Port Huron Hosp*, 290 Mich App 167, 178; 800 NW2d 101 (2010), for its affirmation of the language in *Bush*, 484 Mich at 169, that "the period of limitations is tolled 'at the time notice is given.'" In fact, the court in *Swanson* repeated at two points in the same sentence the statement that the limitations "is tolled" at the time of notice pursuant to MCL 600.5856(c). *Swanson*, 290 Mich App at 178. Thus, regardless of Defendants concern that *Swanson* also decided issues of a defective notice, the case supports Plaintiffs' analysis that amended § 5856(c) and the cases interpreting it call for tolling immediately upon mailing the NOI, and not one or more days after mailing. Immediate tolling results in Plaintiffs retaining one day of the statute of limitations for use in filing the Complaint after the 182-day notice period, which ran through and included June 26, 2014.

Defendants cited *Lancaster v Wease*, unpublished op. *per curiam* of the Court of Appeals, Sept. 28, 2010 (Dkt. No. 291931), for the proposition that the plaintiff had only one day to file a complaint after the notice period even though she mailed an NOI a day before the limitations period expired. (Defs.' Reply Br. at 3.) However, the opinion states that "when the notice period expired on May 28, 2008, the period of limitations resumed running," and footnote two of that opinion clarifies the limitations period resumed running on May 28, 2008. *Id.* at *4 and n2. The court then stated that the plaintiff filed suit one day late on May 30, 2008. *Id.* at *4. While not a picture of clarity, the opinion gave the plaintiff two days to file after the notice period, May 28 and 29, where she had served an NOI the day before the limitations period expired.

Defendants also cite *Hardin v Prieskorn*, unpublished op. *per curiam* of the Court of Appeals, Apr. 1, 2014 (Dkt. No. 311193). (Defs.' Suppl. Br. at 4.) *Hardin* involved a contested agreement to toll the limitations period. The case did not require the court to decide whether the limitations period resumed on the final day of the 182-day notice period, February 1, 2012, or on the day immediately following the 182-day period, February 2, 2012, because the complaint was not filed until February 10, 2012, well after either date. The opinion addressed whether the tolling agreement was binding, not the manner of calculating time pursuant to § 5856(c), so it bears no value to this case and appears as an aspersion against Plaintiffs' counsel's firm.

Defendants quote § 5856(c), "[t]he statute is not tolled longer than . . . the number of days remaining in the **applicable notice period** after the date notice is given" (emphasis added), and state that "[z]ero days remained at the time the NOI was served." (Defs.' Reply Br. at 2.) After the date of the NOI, *182* days remained in the "applicable notice period." Defendants seem to urge the Court to rewrite the statute to toll for "the number of days remaining in the **applicable statute of limitations** after the date notice is given." This baseless rewrite would create varying tolling periods in each case depending upon the days left in the limitations period when the NOI is sent. Plaintiffs have analyzed this provision as written. (Pls. Response Br. at 7, 10-11.)

Defendants have no meaningful response to the fact that *from December 26, 2014 to the present, there was never a day when the statute of limitations was not tolled.* For the reasons presented, Plaintiffs respectfully request that the Court deny Defendants' motion.

Respectfully submitted,

HERTZ SCHRAM PC

Dated: August 25, 2014

Steve J. Weiss (P32174)
Steven P. Jenkins (P59511)
Daniel W. Rucker (P67832)
Attorneys for Plaintiffs

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

JEFFREY HAKSLUOTO
and CAROL HAKSLUOTO,

Plaintiffs,

Case No. 14-2556-NH
Hon. Peter J. Maceroni

v

MT. CLEMENS REGIONAL MEDICAL CENTER,
N/K/A MCLAREN MACOMB,
GENERAL RADIOLOGY ASSOCIATES, P.C.,
And ELI SHAPIRO, D.O.,

Defendants.

PROOF OF SERVICE

The undersigned certifies that on August 25, 2014, she served the following:

- Plaintiff's Supplemental Response in Opposition to Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(7), (8) and (10); and
- Proof of Service

upon:

Jennifer Engelhardt, Esq.
GIARMARCO, MULLINS & HORTON, P.C.
101 W. Big Beaver Road
10th Floor Columbia Center
Troy, MI 48084

via facsimile transmittal and by placing the same in a United States mail receptacle in Bloomfield Hills, Michigan, with postage fully prepaid thereon.

I declare that this Proof of Service has been examined by me and that the contents are true to the best of my information, knowledge and belief.

Shannon Shaw

EXHIBIT 8

Dewan v. Khoury

Court of Appeals of Michigan
March 28, 2006, Decided
No. 265020

Reporter: 2006 Mich. App. LEXIS 884; 2006 WL 785389

CATHERINE DEWAN, Plaintiff-Appellant, v ELIE G. KHOURY, M.D., ORTHOPEDIC SURGERY OF MICHIGAN, and ST. MARY'S MERCY HOSPITAL, a/k/a TRINITY HEALTH SYSTEM, Defendants-Appellees.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Appeal denied by *Dewan v. Khoury, 2006 Mich. LEXIS 2152 (Mich., Oct. 13, 2006)*

Prior History: Wayne Circuit Court. LC No. 04-437134-NH.

Disposition: Affirmed.

Core Terms

limitations period, expired, statute of limitations, days, summary disposition, tolling, medical malpractice action, trial court, file suit, wait, trial court's decision, tolling period, filing suit, time period, last day, malpractice, untimely, Surgery, shorten, notice, novo

Judges: Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants in this medical malpractice case. We affirm.

On June 4, 2002, plaintiff underwent knee surgery performed by defendant Khoury at defendant St. Mary's Mercy Hospital. Complications ensued, requiring further treatment. [1] On June 4, 2004, plaintiff served a notice of intent (NOI) to file a medical malpractice action, as required by *MCL 600.2912d*. Thereafter, plaintiff was required to wait 182 days before filing suit, unless no response to the notice was received after 154 days, *MCL 600.2912b(1)*. During the time period relevant to this case, the filing of a NOI tolled the statute of limitations for 182 days. *MCL 600.5856(d)*. [2] The 182-day period ended on Friday, December 3, 2004. Plaintiff [*2] filed suit on Monday, December 6, 2004.

Khoury and his professional corporation, Orthopedic Surgery of Michigan, moved for summary disposition pursuant to *MCR 2.116(C)(7)*, arguing that plaintiff's complaint was barred by the statute of limitations. Khoury asserted that the statute of limitations tolling provision extended the [*3] time period in which plaintiff could file suit until December 3, 2004, but that the action was untimely because plaintiff did not file suit until December 6, 2004. St. Mary's concurred in Khoury's motion. The trial court agreed and granted the motion, and subsequently denied plaintiff's motion for reconsideration.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell, 249 Mich. App. 468, 479; 642 N.W.2d 406 (2001)*. Absent a disputed factual issue, the determination whether a claim is barred by the expiration of a limitations period is a question of law subject to de novo review. *Young v Sellers, 254 Mich. App. 447, 450; 657 N.W.2d 555 (2002)*.

Plaintiff argues that the trial court erred by granting summary disposition in favor of defendants. She asserts that by holding that her complaint, filed the next business

[1] The alleged medical malpractice occurred on June 4, 2002; therefore, plaintiff's cause of action accrued on that date. MCL 600.5838a(1); *Solowy v Oakwood Hosp Corp, 454 Mich. 214, 222; 561 N.W.2d 843 (1997)*. The statute of limitations for a medical malpractice action is two years. MCL 600.5805(6). The limitations period for plaintiff's cause of action expired on June 4, 2004. See MCR 1.108(3).

[2] 2004 PA 87, effective April 1, 2004, rewrote MCL 600.5856. The amended version of the statute does not apply in this case.

day after expiration of the entire 182-day period, was untimely, the trial court shortened the NOI period to 181 days. Plaintiff contends that the filing of the NOI before midnight on June 4, 2004, left part of the day remaining, and thus left a portion [*4] of the statute of limitations unexpired. She concludes that because a portion of the statute of limitations was remaining on Monday, December 6, 2004, her complaint, filed on that day, was timely. We disagree.

The two-year statute of limitations for plaintiff's medical malpractice action expired on June 4, 2004, absent tolling. *MCL 600.5805(6)*; *MCR 1.108(3)*. Plaintiff served the NOI on June 4, 2004. The 182-day tolling period began running on June 5, 2005, *MCR 1.108(1)*, and expired on Friday, December 3, 2004. Plaintiff was required to wait the entire 182-day period before filing suit. See *Burton v Reed City Hosp. 471 Mich. 745, 747-748; 691 N.W.2d 424 (2005)*. However, because the limitations period expired on June 4, 2004, no time remained to toll during the 182-day period. Therefore, when the 182-day period ended, the statute of limitations did not resume running. Plaintiff had no time remaining in which to file suit. [3]

[*5] Plaintiff's assertion that some portion of the limitations period remained after the NOI was served is without merit because the 182-day tolling period did not begin until June 4, 2004, had passed in its entirety. *MCR 1.108(1)*. Moreover, contrary to plaintiff's assertion, the trial court's decision did not shorten the NOI period to 181 days. Plaintiff chose to wait until the last day of the limitations period in order to serve the NOI. The entire 182-day period elapsed in this case, but plaintiff's act of serving the NOI on the last day of the limitations period ensured that no time would remain in the limitations period when the 182-day period expired.

Affirmed.

/s/ Stephen L. Borrello

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

[3] If plaintiff had served the NOI on June 3, 2004, the 182-day period would have commenced on June, 4, 2004, and expired on December 2, 2004, with one day remaining in the limitations period. Under those circumstances, plaintiff could have timely filed her complaint on December 3, 2004.

EXHIBIT 9

Lancaster v. Wease

Court of Appeals of Michigan
September 28, 2010, Decided
No. 291931

Reporter: 2010 Mich. App. LEXIS 1819; 2010 WL 3767569

BRENDA LANCASTER, Plaintiff-Appellant, v GARY L. WEASE, M.D., and GARY L. WEASE, M.D., P.C., Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Genesee Circuit Court, LC No. 08-088836-NH.

Core Terms

notice, limitations period, malpractice, summary disposition, statute-of-limitations, defendants', affirmative defense, expired

Judges: Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

Opinion

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7) and dismissing plaintiff's complaint. We affirm.

This is a medical malpractice case arising from plaintiff's bariatric surgery performed by defendant Dr. Gary L. Wease. Dr. Wease performed a "Roux-en Y" gastric bypass procedure on plaintiff on November 29, 2005. On May 30, 2008, plaintiff filed the instant malpractice suit alleging that Dr. Wease improperly performed the procedure. The trial court granted defendants' motion for summary disposition, finding that plaintiff's complaint was barred by the statute of limitations.

Plaintiff first contends that the trial court erred in finding that her complaint was not timely filed. We disagree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Arthur Land Co, LLC v Otsego County, 249 Mich App 650, 661; 645 NW2d 50 (2002)*. Summary disposition is available under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. "A defendant who files a motion for [*2] summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence." *Turner v Mercy Hospitals & Health Services of Detroit, 210 Mich App 345, 348; 533 NW2d 365 (1995)*; see also *Patterson v Kleiman, 447 Mich 429, 432; 526 NW2d 879 (1994)*. If documentation is submitted, the court must consider it. MCR 2.116(G)(5). "If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff." *Turner, 210 Mich App at 348*. "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Center, 242 Mich App 703, 706; 620 NW2d 319 (2000)*.

The period of limitations in a medical malpractice action is two years. MCL 600.5805(6). A medical malpractice claim accrues at the time of the act or omission that is the basis for the claim. MCL 600.5838a(1). Here, the alleged malpractice occurred during plaintiff's gastric bypass surgery on [*3] November 29, 2005. Absent tolling, the period of limitations on plaintiff's malpractice claim would have expired on November 29, 2007. MCR 1.108(3); MCL 600.5805(6).

Plaintiff served her notice of intent [1] to file a malpractice claim on November 28, 2007. Under MCL 600.5856(c), if the period of limitations would expire during the 182-day notice period (which it did in the instant case), the period of limitations is tolled "not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." Here, the

[1] "[A] person shall not commence an action alleging medical malpractice against a health professional [*4] or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." MCL 600.2912b(1). A plaintiff is required to wait the entire 182-day period before filing suit. *Burton v Reed City Hospital, 471 Mich 745, 747; 691 NW2d 424 (2005)*.

tolling period began running on November 29, 2007, MCR 1:108(1). When the notice period expired on May 28, 2008, the period of limitations resumed running and expired one day later on May 29, 2008, because only one day in the limitations period had remained when the notice of intent was filed.[2] Plaintiff did not file suit until May 30, 2008. Because plaintiff filed suit one day after the period of limitations expired, the trial court did not err in concluding that plaintiff's complaint was barred by the statute of limitations.

Plaintiff also asserts that the trial court erred in permitting defendants to assert the statute-of-limitations defense even though defendants failed to provide a sufficient factual basis supporting the defense. Review of plaintiff's unpreserved claim of error is limited to determining whether a plain error occurred that affected substantial rights. Kern v Blethen-Coluni, 240 Mich App 333, 336; 612 NW2d 838 (2000).

An affirmative defense, such as a statute-of-limitations defense, must be raised in a party's first responsive pleading or by motion filed not later than this responsive pleading; otherwise, the defense [*5] is waived. Attorney General ex rel Dept of Environmental Quality v Bulk Petroleum Corp, 276 Mich App 654, 664; 741 NW2d 857 (2007); MCR 2.111(F)(2) and (F)(3). A party must state the facts constituting an affirmative defense. MCR 2.111(F)(3)(a). "The underlying rationale for requiring a party to provide factual support for affirmative defenses is to prevent the adverse party from being taken by surprise at trial." Horvath v Delida, 213 Mich App 620, 630; 540 NW2d 760 (1995).

Paragraph four of defendants' affirmative defenses provided:

> 4. That if, during the course of discovery in this matter, it is substantiated that any of Plaintiff's claims are barred by the Statute of Limitations applicable to said cause, these Defendants reserve the right to bring on before this Court a Motion for summary Disposition on said basis.

It is true that defendants did not provide a factual basis for the statute-of-limitations defense. However, no affirmative defense will be held insufficient where the defense is "sufficient to permit the opposite party to take a responsive position." Hanon v Barber, 99 Mich App 851, 856; 298 NW2d 866 (1980) (internal citation and quotation marks omitted). Plaintiff does [*6] not suggest that she was surprised by the statute-of-limitations argument raised in defendants' motion for summary disposition, nor is there any evidence to suggest that plaintiff lacked enough notice of the defense to enable her to formulate a responsive position. Defendants have not presented some novel or unusual statute-of-limitations argument. Plaintiff did not require time or resources over and above what she had in order to adequately respond to defendants' argument. Defendants' statement in their affirmative-defenses document was sufficient to preserve a statute-of-limitations defense because it put plaintiff on notice that defendants might assert that the complaint was untimely filed. No plain error affecting substantial rights occurred. Accordingly, we conclude that reversal is unwarranted.

Affirmed.

/s/ Michael J. Talbot

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

---

[2] We note that May 29, 2008, was a Thursday, and therefore, it was possible for plaintiff to file suit on that day. Plaintiff's computation is one day off when she suggests that the period of limitations resumed running on May 29, 2008.

EXHIBIT 10

STATE OF MICHIGAN

COURT OF APPEALS

DIANE HARDIN,

Plaintiff-Appellant,

v

DAVID W. PRIESKORN, D.O., and TRI-COUNTY ORTHOPEDICS, P.C.,

Defendant-Appellees.

UNPUBLISHED
April 1, 2014

No. 311193
Oakland Circuit Court
LC No. 2012-124878-NH

Before: METER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(7). We affirm.

Plaintiff brought this medical malpractice action in connection with injuries she allegedly received as a result of total knee replacement surgery that was performed by defendant Prieskorn on August 3, 2009. The issues properly before this Court are whether the limitations period was tolled by agreement of the parties and whether the doctrine of equitable estoppel applies so as to prevent defendants from using the statute of limitations as a defense.[1]

After plaintiff provided defendants with notice of intent to file suit, the limitations period was tolled for a period of 182 days, making February 1, 2012, the expiration date of the applicable two-year limitations period. MCL 600.2912b; MCL 600.5838a; MCL 600.5856.

[1] Plaintiff also argues that her complaint alleged negligence in connection with her post-surgical visits and that her complaint was timely filed with regard to these visits. Plaintiff fails to develop this issue with adequate authority and argument; she merely cites an unpublished case and also attempts to distinguish a case relied upon by defendants, stating that it provides "supportive commentary" for plaintiff's position. In light of the paucity of the briefing, we decline to address the issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority").

Plaintiff filed her complaint on February 10, 2012. Plaintiff alleges that sometime in January 2012 she entered into an oral agreement with James Olivetti, an employee of defendants' malpractice insurance provider, to toll the limitations period for two weeks.

This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681-682; 599 NW2d 546 (1999). "We consider all documentary evidence submitted by the parties and accept the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true." *Id.* "We view the uncontradicted allegations in favor of the plaintiff and determine whether the claim is time-barred." *Id.*

Plaintiff relies on the Supreme Court's decision in *Pitsch v Blandford*, 474 Mich 879; 704 NW2d 695 (2005), to support her position. Unlike in the present case, however, in *Pitsch*, *id.* at 879, the parties had entered into an unambiguous agreement to toll the statute of limitations. The Supreme Court held that because such an agreement was in place, it was to be enforced as written. *Id.* In the present case, there was insufficient evidence that *the parties* entered into a valid and enforceable agreement at all. As noted by defendant, plaintiff alleges only that a representative of defendants' insurance company orally agreed to toll the limitations period, and there was insufficient evidence that this person was authorized to bind defendants to such an agreement.[2] As such, plaintiff's reliance on *Pitsch* is misplaced. Because the existence of a clear and unambiguous agreement to toll the statute of limitations was not apparent from the evidence submitted, the trial court properly found that the *Pitsch* holding did not apply to the alleged oral agreement between the parties in the present case. Nor did the evidence submitted raise a factual issue for trial.

Plaintiff argues that equitable estoppel applies and barred defendants from raising the statute of limitations as a defense. For equitable estoppel to apply, plaintiff must establish that (1) defendants' acts or representations induced plaintiff to believe that the statutory limitations period would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on the belief. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008).

On January 25, 2012—seven days before the February 1, 2012, filing deadline—plaintiff's counsel, Steve Weiss, forwarded to Olivetti a written tolling agreement. Weiss asked Olivetti to review the proposed written agreement and contact him with any changes Olivetti thought necessary, or otherwise to sign and return it. Even assuming that Weiss had previously reached some sort of oral agreement with Olivetti, when Olivetti still had not signed the agreement or otherwise replied to the request by January 31, 2012, there was clearly no

[2] As noted by defendant, it is incumbent on the party who relies on an alleged agency to show what authority the agent actually had, see *Selected Investments Co v Brown*, 288 Mich 383, 388; 284 NW 918 (1939), and "[a]gency may not be established by proof of declarations by the supposed agent," *In re Union City Milk Co*, 329 Mich 506, 513; 46 NW2d 361 (1951).

justification to delay the filing of plaintiff's complaint further and allow the February 1, 2012, filing deadline to pass.[3]

The trial court properly found that justifiable reliance by plaintiff was absent and that the doctrine of equitable estoppel, therefore, did not apply to prevent defendants from raising the statute of limitations as a defense.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

[3] Moreover, as noted, Olivetti was merely a representative of defendants' insurer.